

Insurance Counsel Journal

July, 1937

VOL. IV

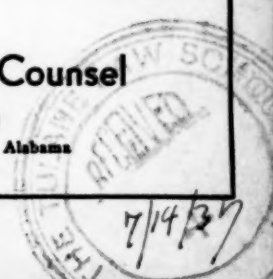
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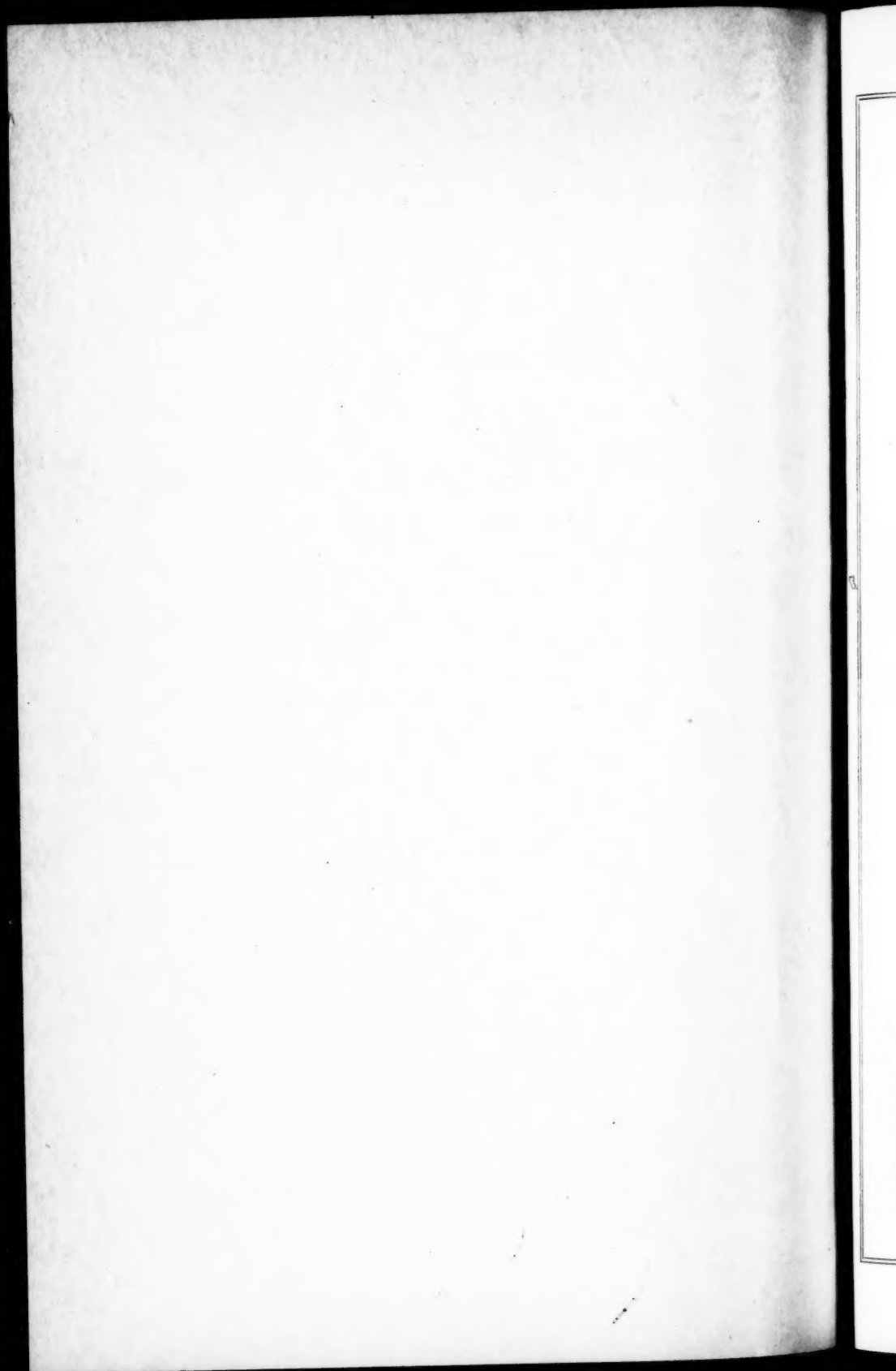
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White Sulphur Springs, West Virginia

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1936-1937

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PURPOSE

The purpose of this Association shall be to bring into closer contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, who are actively engaged wholly or in (substantial) part in the practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

PROGRAM

1937 CONVENTION, WHITE SULPHUR SPRINGS, WEST VIRGINIA

TUESDAY, AUGUST 24, 1937

8:30 P. M. Meeting of Executive Committee.

WEDNESDAY, AUGUST 25, 1937

9:00 A.M. Registration of Members and Guests.

- 10:00 A.M.
1. Roll Call.
 2. Reading of Minutes.
 3. Address of Welcome by Hon. Clarence E. Martin, Past President, American Bar Association.
 4. Response for Association by Willis Smith, Esq.
 5. Address of President.
 6. Address by Henry W. Nichols, General Counsel, National Surety Corporation, "Bankers and Brokers Blanket Bonds."
 7. Announcement of Nominating Committee Personnel.
 8. Announcements, W. O. Reeder, Chairman, Entertainment Committee.

1:00 P.M. Adjournment.

2:30 P.M. Re-convene.

1. Address by F. B. Baylor, Esq., "The Defense of Guest Cases."
2. H. Melvin Roberts, Esq., "When Verdict for Plaintiff Against One of Two Defendants, May the Losing Defendant Have an Indemnity Action Against the Winning Defendant, as the Real Tort Feasor, Notwithstanding the Verdict?"
3. Address by Thomas L. Johnson, Esq., "The Rule in Jump's Case."
4. Report of Executive Committee.
5. Report of the Secretary.
6. Report of the Treasurer.
7. Report of the Legislative Committee, by Russell M. Knepper, Chairman.
8. Report of other committees, not published in July Journal.
9. Discussion of Committee Reports.
10. Discussion of Addresses, if time available.

5:15 P.M. Adjournment.

6:15 P.M. Assembly Room—Social Hour.

8:15 P.M. Dinner and Dance—Movies.

PROGRAM

1937 CONVENTION, WHITE SULPHUR SPRINGS, WEST VIRGINIA

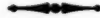
THURSDAY, AUGUST 26, 1937

- 9:30 A.M. 1. Reports of Special and General Committees on Unlawful Practice of Law—Adjusters. Harry S. Knight and Geo. Naught, Respective Chairmen.
2. Address by Hon. Leonard M. Gardner, Counsel for Insurance Department of New York State—"The Proposed Revision of New York State Insurance Law."
3. "Forwarding the Cause of Traffic Safety." One hour discussion under the direction of Ambrose B. Kelly and Oscar J. Brown. Speakers Sidney J. Williams (National Safety Council), Bob Hall (Asst. Counsel, Aetna), Byrne Bowman and Francis M. Holt, Esqs.
4. Announcements.
- 12:30 P.M. Adjournment.
- 2:00 P.M. Gold Tournament (Men).
Bridge Tournament (Ladies and Men).
- 8:00 P.M. Reception.
- 8:30 P.M. Banquet.
Address, Hon. Harvey T. Harrison, Subject "Dogmatisms of a Barking Dog."
Dancing.

FRIDAY, AUGUST 27, 1937

- 9:30 A.M. Short Addresses by three younger members:
1. Theodore W. Bethea, "The Right of the Insurer to a Physical Examination of the Plaintiff in Negligence Actions."
 2. Lon Hocker, Jr., "A Motion for Judgment, Notwithstanding the Absence of a Verdict."
 3. Calvin Wells, III, "Do Statutory Provisions as to Copy of Application for Insurance Being Furnished Applicant Apply to Application for Reinstatement?"
 4. Unfinished business.
 5. New business.
 6. Report of Nominating Committee, Election.
 7. Report of Golf Committee. Presentation of golf and bridge prizes.
- 1:00 P.M. Adjournment, by President Elect.

The President's Page



WE are now coming to the end of another year. Again, this year marks an era of growth in membership and in interest. The spirit of harmony and comradeship is easily apparent. Our members are looking forward to the Convention in August, not only because they will there again greet friends and make new ones, but because they feel that the Association program holds an interest for them. Progress is attractive. There is a feeling that we are now putting into practice the very purposes of the organization. Its purpose is not one of selfishness. The very essence of the purposes of this Association is that of helpfulness to the great business of insurance, protective aid and a purpose to serve. The work of the General Legislative Committee, under the leadership of Chairman Knepper, is of outstanding importance. That service alone justifies the existence of the Association.

The Journal, under the skillful hand of Editor Yancey, has found its place in the sun. To him we are all indebted for an unselfish service.

In this, my last appearance on this page, I greet you with heartfelt thanks for your cooperation, service and friendship. Not one of you has failed to respond in service requested. You will fill my cup to overflowing if you meet me at Greenbrier Hotel—you my "Aaron and Hur stayed up his hands."

To you, my fellow officers and members of the Executive Committee,—my blessings and my thanks.

Sincerely,

MARION N. CHRESTMAN.

Insurance Counsel Journal

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VOL. IV JULY, 1937 No. 3

CONVENTION

It is important that members make reservations for themselves and their guests as soon as possible at The Greenbrier Hotel, White Sulphur Springs, West Virginia, for the Annual Convention to be held August 25th, 26th and 27th.

The Greenbrier Hotel is a large, handsome, modern summer and winter resort hotel located in one of the most attractive spots of the West Virginia mountains. The food is excellent. Those attending the Convention may enjoy golf, tennis, horseback riding, mountain climbing, sulphur water, not "and" but "or" fizz water, and a program provided for you by our President, Judge Chrestman, which you will not only enjoy but will find of benefit as an insurance lawyer. May I also call your attention to the social hour (or more)? The Association will be your host and you will have an opportunity to put aside the business at home and the business of the meeting, and to meet again your old friends, and make new ones.

I am sure that you have read with interest the program which appears in this issue of the Journal. The subject selected by one of the speakers is so provocative of interest I will take the liberty of referring to it for fear you have overlooked it. I refer to the subject, "Dogmatism of a Barking Dog," selected by the Honorable Harvey T. Harrison of Little Rock, Arkansas. I wish to congratulate our distinguished speaker on the selection of

his subject. I am sure that most of the members know from the title of this address just how this subject will be treated. For fear that some of you, however, may not know just exactly what to expect, may I take the liberty of quoting from a letter from Mr. Harrison to Judge Chrestman in reference to the subject matter of his speech; "The subject which I have selected is like unto a handle that will fit any hammer, or an old fashioned Mother Hubbard which covers everything and touches nothing." Such is the genius of Mr. Harrison. With one mighty stroke he converts the fog into congealed clouds. I assure the readers of the Journal that I am very happy indeed to have had the opportunity to clarify the meaning of the topic to be discussed at our Convention by our distinguished speaker.

* * *

GUARDIANSHIP

Some year or two ago, your Editor, who represented the surety on the bond of the guardian of a non compos mentis, was extremely anxious to obtain certain information concerning the estate. Failing to obtain it from the guardian, he finally in desperation wrote the ward. After some delay he received the following clear and cogent letter signed by the non compos mentis. We are wondering whether his clarity of expression and choice of simple words may be improved upon!

"Dear Sir:

With reference to the below named, effects, Estate and Affects as are warranted by the development resulting by the alertness of your capacity with the same of the named below, between the Date 12-12-33 and the 12-6-34.

Whereof, in repressive retention resulting of inacceptancy conditionally, except by the Common consent which is necessary to the due course in the foregoing.

Therefore, I recall in written manner of which I promised to submit to the litigated

situation surrounding the Estate so involved, as previous the submission was only vocal and as follows. Let the bygone be bygone for the proper foregoing.

It is therefore realized in the analysis, this you would have done with reproach excepted in conform to the designed course. It for the time accomplished to result the cooperation necessary for your transaction in the matter being previously impossible.

In the event all of these liberal presents fail I along with you request the custody of the Guardian of this Special Estate, for testimony in accountants. Also the probate court records revealed that be responsible for \$900.00 or more. You will appreciate the foregoing of this instrument.

Cordially,

* * *

JOURNAL

A member has suggested to your Editor that the Journal be published on standard size paper with eyelets on the side so that an article may be removed and placed with prior articles on the same subject in a standard binder and thereby easily kept available for reference. A few years ago the Executive Committee instructed your Editor to make a tentative selection of a binder for the Journal, obtain bids and then advise members through the Journal of the cost of the binder and if a sufficient number of members desired the binders to have a supply prepared and furnish same to the members at cost. Your Editor, acting upon these instructions, made a tentative selection a binder, obtained the cost of

a supply of these binders and advised the membership of the cost and requested that the Editor's office be notified by members who desired same. The requests for such a binder were insufficient to warrant the giving of an order for a supply of binders and the matter has been held in abeyance until now.

Your Editor has found that the Journals may be kept together very conveniently by punching holes through the back and binding the Journals together with a cord or tape. Once each year an index is prepared showing the volume and page of all the articles which have heretofore appeared in the Journal or in the Year Books.

Law libraries and law schools are, from year to year in increasing numbers, subscribing to the Journal. I am glad to say that an increasing number of the members of the Association as well as outsiders are requesting back issues of the Journal and Year Book in order to obtain an article which they find listed in the index. I trust that the membership will feel free at all times to write the Journal office and request such issues of the Journal which they have misplaced and desire to review.

It has also been suggested that several pages in each issue of the Journal be devoted to a brief review of the decisions of the courts throughout the United States on subjects of current interest to the membership. It has been suggested that this be done in a manner similar to that of certain law reviews, furnishing a list and the holdings of recent appellate court decisions. If the membership desires such a review, your Editor is of the opinion that this can be done without increasing the expense of running the Editor's office.

ANNUAL CONVENTION 1937:

August 25th, 26th and 27th

WHITE SULPHUR SPRINGS, WEST VIRGINIA

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* * *

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(Tennis, Swimming, etc.)
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* * *

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Mrs. H. Melvin Roberts, Cleveland, Ohio.

Report of Casualty Committee

COMES now the duly appointed (qualified?) and acting Casualty Committee and by leave of Court first had and obtained respectfully submits its report and states:

That this report is made up by the contributions of the individual members of a compilation of cases in the opinion of the committee valuable to the lawyer interested in insurance problems.

Insurer's Liability—Occupational Diseases

Is an Insurance Company liable to its assured under the Standard Workmen's Compensation and Employer's Liability Policy for damages recovered by an employee based on the contraction of an occupational disease, where not compensable under the Workmen's Compensation Law and when there is no endorsement on the policy covering occupational diseases?

In the beginning compensation laws were framed primarily and intended only to cover injury or death caused by an accident. Because of the rapid strides of industry with its attending complexities, occupational diseases began to be a new source of disablement or death. In addition, there developed new occupational diseases because of exposures to new hazards.

The Supreme Court of the State of Michigan in 1914 had before it a fatal case (Adams v. Acme White Lead and Color Works—148 N. E. 485) involving lead poisoning. In considering that case the court said that enactment of Workmen's Compensation Acts had for its object more just and humane laws to take the place of the common law remedy for compensation of workmen for accidental injuries received in the course of their employment, by the taking away and removal of certain defenses in that class of cases; that the terms "personal injury" and "personal injuries" refer to common law conditions and liabilities and do not refer to and include occupational diseases, for there was no right of action for injury or death due to occupational diseases at common law, but, generally speaking, only a common law remedy for accidents, or rather accidental injuries gave the right of action. The court also pointed out its inability to find a single case where an employee had recovered compensation for an occupational disease at common law.

The Illinois Supreme Court in 1936 had before it a case (McCreery v. The Libby-Owens-Ford Glass Co.—2 N. E. (2d) 290) in which the employee filed a common law action against his employer based on negligence and failure to provide reasonable devices to eliminate dust, causing Pneumoconiosis, an alleged occupational disease. The plaintiff alleged negligence and failure on the part of the employer to furnish the plaintiff with a reasonably safe place to work; that there were no proper suction fans and no reasonable masks or respirators provided. The defendant moved to dismiss, the basis of the motion being that the complaint did not charge the defendant with having violated any statute of the State of Illinois; that in the absence of a statute, defendant was not liable to the plaintiff for contracting an occupational disease; that such an injury was one for which the employer would not have a common law liability. This motion was sustained by the trial court, affirmed by the Appellate Court and subsequently by the Supreme Court.

NOTE: Previous to the McCreery case the Supreme Court of Illinois in 1935 decided in several cases (Parks v. Libby-Owens-Ford Glass Co. 195 N. E. 616, and Boshuizen v. Thompson & Taylor Co., 195 N. E. 625) that Section 1 of the Illinois Occupational Diseases Law, passed in 1911, which provided that every employer carrying on work that may produce any peculiar illness must provide reasonable and approved devices, means or methods for its prevention, was unconstitutional.

Hence, in the McCreery case (supra) the plaintiff not being enabled as a matter of law to recover for the violation of the statute, because it was unconstitutional, endeavored to seek redress at common law. The court pointed out, after reviewing the grounds upon which it previously held Section 1 of the Occupational Diseases Law of Illinois was unconstitutional, that the common law required the employer to furnish his employee a reasonably safe place in which to work, but that a "safe" place did not imply or mean a "healthful" or "sanitary" place. The right of recovery at common law for an occupational disease was denied. The court also stated

that the matter of occupational diseases has neither common law history nor origin, citing:

Parks v. The Libby-Owens-Ford Glass Co. (Ill. 1935) 195 N. E. 616;
Boshuizen v. Thompson & Taylor Co. (Ill. 1935) 195 N. E. 625;

See also:

Miller v. American Steel & Wire Co. (Conn. 1916) 97 Atl. 345;
Zajachuck v. Willard Storage Battery Co. (Ohio 1922) 140 N. E. 405;
Industrial Commission of Ohio v. Monroe (Ohio 1924) 148 N. E. 213;
Gordon v. Travelers' Insurance Co. (Tex. 1926) 207 S. W. 911;
Ewers v. Buckeye Clay Pot Co. (Ohio 1928) 163 N. E. 577;
Calhoun v. Washington Vencer Co. (Wash. 1932) 15 Pac. (2d) 943;
Webb v. Tubize-Chatillon Corp. (Ga. 1932) 165 S. E. 775;
Sylvester v. The Buda Co. (Ill. 1935) Ill. App. Ct. July 5, 1935;
McCreery v. The Libby-Owens-Ford Glass Co. (Ill. 1936) 2 N. E. (2d) 290;
McGuire v. The Sherwin-Williams Co. (Ill. 1936) 87 Fed. (2d) 716;
Vogel v. The Johns-Manville Co. (Ill. 1936) 2 N. E. (2d) 716;
Mozingo v. Marion Steam Shovel Co. (Ohio 1936) 200 N. E. 756, 57 S. Ct. 12.

Therefore, in States following the rule laid down in *Innes v. G. & G. Kynoch*, 9 Brt. Rul. Cas. 478, 419 A. C. 765, 121 L. T. N. S. 39 where it has been held that there is no liability of the employer for occupational disease under the common law, it follows logically that under the terms of the policy the insurance carrier is not liable.

McCreery v. Libby-Owens-Ford Glass Co. 2 N. E. (2d) Ill. 290;
Boshuizen v. Thompson & Taylor Co. 195 N. E. 625.

In cases where for any reason the court of last resort has held that there is a common law remedy for an occupational disease or that there was a statutory liability for occupational diseases in an action at law and such decision was not covered by the Workmen's Compensation Act and the employer has a judgment rendered against him, the following

cases held that the insurance carrier is not liable to the employer insured under the policy.

Maxson v. N. J. Manufacturer's 162 Atl. N. J. 427;
Belleville Enameling & Stamping Co. v. U. S. Casualty Co. 266 Ill. App. 586;
Utica Mutual v. Hamera 292 N. Y. Supp. 811.

An important development has arisen in Missouri in the case of *Soukup v. The Employers' Liability*. Missouri Supreme Court, Division 2, September term, 1936 (unreported). This action originated in a suit for damages for disability as the result of lead poisoning. The insurer contended that its Standard Workmen's Compensation and Employers' Liability Policy did not cover this cause of action, that the policy only protected the employer for injuries caused by accidents. The Supreme Court of Missouri, Div. 2, upheld the contention of the insurer. It ruled that the policy clearly limited the liability of the insurer for injuries caused by accidents and that the policy did not cover occupational diseases.

See, however:

Blanke-Baer Extract Co. 96 S. W. (2d) (Mo.) 648.

A motion for rehearing was filed in the Supreme Court in the Soukup case. The Court of Appeals' decision in the Blanke-Baer case is being appealed to the Supreme Court. These cases are pending before the Supreme Court in separate divisions.

Some Pertinent Decisions On Automobile Insurance

"Insurer issuing policy insuring automobile owner against liability for injuries accidentally suffered held not liable to pay judgment against owner for injuries suffered as result of owner's willful and wanton conduct in operating automobile."

American Casualty Co. v. Brinsky et al 200 N. E. 654;

"See also *Miller v. U. S. F. & G. Co.* 197 N. E. 75."

The Workmen's Compensation and Employers' Liability policy applies as respects compensation for injuries to employees hired

by the insured but does not apply to the insured's obligations to pay compensation for injuries to an employee of a subcontractor of the insured unless by an endorsement specifically providing such application.

Passarelli v. Columbia Engineering Co.
270 N. Y. 68, 200 N. E. 583.

"Refusal of home office of automobile liability insurer to settle action against insured for amount within coverage of policy would be insufficient to sustain charge of bad faith, so as to render insurer liable to insured for damage arising from refusal to make settlement, but refusal which was persistently maintained against advice of counsel and repeated recommendation of adjuster on complete information concerning limit probability of verdict in excess of policy limit would be sufficient to warrant inference of bad faith."

Johnson v. Hardware Mut. Casualty Co.
187 A. 789.

See also—

Ritkowski et al v. Fidelity & Casualty of N. Y. 189 A. 102.

Cases on Agency With Respect to the Use of An Automobile

American Metal v. Benske, 95 S. W. (2d) Texas, 370;

Kourik v. English, 100 S. W. (2d) Missouri, 901, 905;

Glenn Falls Indemnity v. Zurn, 87 Fed. (2d) 988;

Ballard v. Ocean Accident, 86 Fed. (2d) 449.

Cases Involving Violation of Law Clause In the Ordinary Accident Policy

In Osborne v. Peoples Life Company, 139 So. (La.) 733, February 1932.

The policy provided "neither shall it, the insurer, be liable for death or injury received while in the commission of, or as punishment for some act in violation of any law."

Assured when he was shot was in fact at the time committing the unlawful act of an assault, in that he was cursing Hubbell, threatened to kill him and walked toward him in a menacing manner. The court held:

"That the violation of the law thus being committed—was the direct and proximate cause of the injury there can be no question."

For violation of provision against aerial navigation see *Murphy v. Union Indemnity* 134 So. (La.) 256.

Diamond v. New York Life, 42 Fed. (2d) 910 (Ill.)

"While the unlawful act of the assured must tend in the natural line of causation to his death in order to work a forfeiture, it is not necessary that the act should be the direct cause—It is enough if the act is unlawful in itself and the consequences flowing from it are such as might have been reasonably expected to happen."

See *Supreme Lodge vs. Beck*, 181 U. S. 49; *Occident Life v. Holcomb*, 10 Fed. (2d) 125.

In *Travelers Association v. Prinsen*, 291 U. S. 576, March, 1934, the policy excepted liability "if he dies when he is participating in the carriage of explosives." In which the court said:

"At the very least, the explosion was a concurrent cause of death, if indeed not the sole one. The policy does not mean that in the event of a prescribed activity there shall be a segregation of causes operating in unison and a distribution of consequences assignable to each. One of the essential purposes to be served by the limitation of the risk is to put an end to such a process of dissection and comparison—At the moment of the casualty the insurance was suspended by an aggravation of hazard and suspended it remained until the hazard was removed."

In *Provident v. Eaton*, 84 Fed. (2d) 528 the policy provided that the insurance did not cover injury sustained by the insured while under the influence of an intoxicant, or while violating the law. The defense was driving an automobile while intoxicated.

The defendant assigned error for the refusal of the judge to charge that the intoxication at the time of the accident need not contribute to or cause the accident in order to exempt the defendant.

Following *Flannigan v. Provident Life*, 22 Fed (2d) 136, the court held:

"We think, however, that by their express provisions the policies do not cover injuries received while the insured was intoxicated, as he clearly was at the time—and that it was not necessary to show any causative connection between the intoxicated condition and the injury."

Phillips v. Davis, Circuit Court of Appeals, 3 Fed. (2d) 798 (Penn.). Plaintiff was driving along a street on a dark rainy night. He approached within twenty-five feet of an unguarded railroad crossing, where he stopped, looked and listened in obedience to the law of Pennsylvania. He was struck by a train, and a non-suit was directed by reason of contributory negligence. The court held:

"The plaintiff cannot be exonerated from the charge of contributory negligence on the ground that the night was dark and rainy and the street was wet, nor on the ground that they were required to observe the dimmer ordinance of the city of Scranton. They were bound to operate their car with due regard to these conditions, and to the ordinance as well."

See *Serfas v. Railway*, 14 A. L. R. 791; *Lancaster v. Texas Railroad*, 72 S. W. (2d) (Texas) 326.

Brimhall v. State, 53 A. L. R. (Ariz.) 231.

The defendant was charged with driving a car while intoxicated and with willful indifference of the lives and safety of others. The court held:

"There are numerous cases where conviction of manslaughter has been sustained when death was caused by the reckless driving of an automobile, the court holding in all such cases that the intent to kill or malice was not necessary. Convictions of this kind have occurred in practically every state in the union, and there has been a uniformity of decisions upholding conviction."

"Where a party intentionally does an unlawful act—and while so violating a positive law—runs into and injures another person, the rule seems to be that his con-

duct imputes to him the intention to do what in fact he does do."

State v. Agnew, 164 S. E. (No. Car.) 578.

"Obviously the intentional violation of a statute designed and intended to protect life is a criminal act within the contemplation of the law—In such case the state would make out a prima facie case by offering proof of such violation sufficient to convince the jury beyond a reasonable doubt."

See 16 A. L. R. 914, heading *Manslaughter*.

Savitt v. United States, Circuit Court of Appeals, 59 Fed. (2d) (N. J.) 541.

"There was, of course, in this case as in most cases of this kind no direct evidence of intent to defraud—but intent can be proved by facts and acts from which it may be inferred—Every man is presumed to intend the natural and necessary consequences of his act."

In *Commonwealth v. Ober*, 189 N. E. (Mass.) 601, Ober was found guilty of violating traffic rules. The court held:

"The legislation here under consideration belongs to the class of statutes where the general court legislating for the common welfare has put the burden upon the individual of ascertaining at his peril whether his conduct is within the scope of the criminal prohibition. The moral turpitude, the motive which prompts the illegal act and the knowledge or ignorance of its criminal character are immaterial on the question of guilt."

See *State v. Dobry*, 250 N. W. (Iowa) 702.

It is the hope of the Casualty Committee that the above cases, while rather haphazardly selected, will be found to be useful leads that will aid in the solution of the everyday problems confronted by the membership.

Respectfully submitted,

THOMAS N. BARTLETT,

BENJ. BROOKS,

THOMAS L. JOHNSON,

W. L. KEMPER,

HAROLD S. THOMAS, *Chairman*.

Report of Committee on Fidelity and Surety Insurance

THERE are about forty-two companies, members of the Surety Association of America, engaged in the business of writing fidelity and surety bonds. There are also certain non-members engaged in a like business. Hence your Committee is mindful of the importance of its assignment because many members of the International Association of Insurance Counsel represent one or more of all the companies engaged in the writing of fidelity and surety bonds. What our Association may do in aid of the progress of this classified branch of insurance should result in much benefit to the members of our Association.

In addition to the legal services rendered by our members to insurance companies, (and those companies, we must acknowledge, have earned the general classification of "paying clients") there is often afforded the opportunity to assist the companies, without being directly compensated, in connection with bills relating to insurance introduced from time to time in certain of our state legislatures and in Congress. We are sometimes reminded of the two inevitables of existence, "death and taxes". A few companies succumbed during the recent throttling years, but the others are carrying on courageously and soundly—and are paying a very substantial amount of taxes. Those companies do look to our membership for aid in resisting unreasonable taxation and the prescription of penalties, and requirements that would lead to an increased cost of insurance. Unfortunately, we find too many tax-minded legislators willing to increase the tax burdens of insurance companies. In addition to the license fees entitling an insurance company to do business in a given state, and the taxes on premiums collected therein, some states have passed laws authorizing certain cities and towns to levy special taxes against such a company. There has also been a continuous effort in some quarters to increase the license taxes of agents who represent the insurance companies.

We are also mindful of continued efforts in some states to put those states in the insurance business through the establishment of state fund systems regardless of the unsatisfactory record of such a method of insurance. We should bear in mind that to such an extent

as any state fund insurance may be put into operation, to that extent will the opportunity for our representation of insurance companies be diminished.

We also report that within the past year considerable thought has been given by members of your Committee and some definite work done in connection with a proposed model bill for the release of sureties on the bonds of trustees, committees, guardians, assignees, receivers, executors, administrators, or other fiduciaries, and on the bonds of public officials. Your Chairman, who is a member of the Fidelity and Surety Insurance Law Committee of the insurance section of the American Bar, has been in attendance at meetings in Baltimore and Washington where a draft of such proposed model bill has been discussed and worked upon. Such a bill is now the subject of an attempted revision for presentation at the next meeting of the American Bar but there is doubt in the mind of your Chairman that an acceptable revision of the bill will be accomplished for presentation at the next meeting of the American Bar Association. In the event that such a bill shall not be presented and approved, it is believed by your Committee on Fidelity and Surety Insurance that a form of bill or bills for the release of sureties, which is acceptable to your Committee, should be completed and passed along through proper agencies without cost to our Association, for legislative enactment in the various states that now have no laws providing for such release.

In justice to all insurance companies represented by members of our Association, and which companies are conducting business only through due qualification and observance of the laws of our various states, your attention is respectfully directed to a recent decision in the State of Georgia, a published report of which in May this year reads as follows:

"Judge B. P. Gaillard, Jr., In Hall Superior Court at Gainesville, Georgia, on Saturday overruled demurrers filed by the defense in the suit in which Sidney Weiss is seeking to recover \$150,000 from the Paconet Manufacturing Corporation of Gainesville. The suit was instituted by Weiss as informer, under a Georgia law, effective March 28, 1935, providing that if a citizen

of Georgia insures in a company not licensed in the State and recovers a loss from such company, the person who informs the court and proves that the assured made such recovery may collect for himself one-half of a penalty of 10 per cent of the amount recovered by the assured, the other half going to the State.

Weiss alleged that the Pacolet Manufacturing Corporation held policies in the Associated Factory Mutuals of Providence, R. I., not licensed in Georgia, and that following the tornado which struck Gainesville last spring, collected a loss of \$1,500,000 from these companies for damage to its property by the tornado. He asked the court to assess the 10 per cent penalty provided in the law.

In a demurrer to the complaint of Weiss, attorneys for the defendant corporation and their insurers contended that the Georgia law is unconstitutional in that it impairs the obligations of contract and deprives citizens of the right to make contracts. Judge Gaillard ruled that the act is constitutional and that the State under its police power has a right to supervise and control the writing and doing business of insurance in Georgia.

A supplementary suit has been filed by P. H. Collins, Atlanta insurance man. W. L. Bryan, Atlanta attorney, with R. W. Smith, Jr., of Gainesville, is representing Weiss and Collins. Mr. Bryan said that Georgia is the only commonwealth in the United States with such a statute and the Weiss suit is believed to be the only one of its kind ever brought into court under this law."

It is also believed that readers of the Journal may find of interest the following:

Hotop v. the Maryland Casualty Company was decided by the New York Court of Appeals on May 26, 1937.

A trial of the action brought by Hotop against English & Greenfader, Inc., for personal injuries caused by their automobile, resulted in a verdict for \$25,000. The trial justice reduced the amount to \$15,000 for which a judgment was entered. Both parties appealed and the Maryland Casualty Company executed an appeal bond on behalf of the defendants, a condition of which was "that if the judgment *** so appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the sum

recovered or directed to be paid by the judgment *** or the part thereof, as to which it is affirmed."

The Appellate Division reinstated the original verdict and judgment for \$25,922.99 was entered against English & Greenfader. They did not pay the judgment and Hotop sued the Maryland Casualty Company, which had issued to English and Greenfader a liability policy with a limit of \$20,000. The Maryland paid \$20,317.55.

Hotop then sued the Maryland Casualty Company on the appeal bond for \$5,605.44, the difference between the amount the company had paid him under the liability policy and the amount of his judgment as reinstated by the Appellate Division.

The Court of Appeals held that the Maryland Casualty Company under its appeal bond had obligated itself to pay a judgment of \$15,000 in certain events and that "nothing in the undertaking can lead to the inference that either party intended that in the event of a modification by addition to the judgment the surety would pay such additional sum."

The Court also said: "By defendant's payment of \$20,317.55 to plaintiff it has fully discharged its obligation pursuant to its undertaking on appeal and also its obligation under its liability policy."

Martin v. National Surety Company et al., 57 Supreme Court Reporter, page 531, was decided by the Supreme Court of the United States on March 29, 1937.

One Tobin entered into a contract with the United States for the construction of a post office. He executed the usual bond in which the National Surety Company was surety, with the condition that the contractor would promptly make payment to all persons supplying the principal with labor and materials.

(It happened that the agent of the National Surety Company who executed the bond had been forbidden to execute it and his agency was canceled in consequence of his action. It was, however, conceded that the bond was binding upon the National Surety Company.)

In the application for the bond Tobin, the contractor, stated that he had not assigned, and would not assign to third persons, his payments on the contract or any part thereof, and by the same instrument he assigned the payments to the surety in the event of any breach in default of the contract, the proceeds to be credited upon any loss or damage.

After the cancellation of Martin's agency, he loaned money to the contractor from time to time under an agreement for a division of the profits of the enterprise. When the building was nearly completed the total of these loans was in excess of \$10,000. The work had been done to the satisfaction of the government, but bills for labor and material were in default. The surety became aware of the situation and demanded that the contractor execute a power of attorney for the collection of any payments then owing from the government or falling due thereafter. Tobin took the document, saying that he would show it to his lawyer. Instead he showed it to Martin, for whose benefit he signed another power of attorney, as well as a letter addressed to the Treasury Department, directing that all checks for Tobin should thereafter go to Martin. These documents were intended to have the effect of an assignment which would be security to Martin for the amount of his advances. Both documents were forwarded to the Treasury as soon as they were signed and Martin called upon the Treasury and received from the government a warrant for \$10,448.10, the progress or deferred payments then due from the contract. This sum he collected and applied upon his loans.

At that time the building was substantially completed.

As soon as the surety ascertained these facts, it brought suit in the District Court in Missouri to protect the interests of the materialmen and laborers, joining Tobin and Martin as defendants, as well as certain officers of the government. It prayed to the court that the moneys received by Martin be impounded and disbursed in payment of the bills for material and labor and in exoneration of the bond. Martin paid into the Registry of the court the amount which he had collected from the government. After notice to the materialmen and laborers to file their claims the court made a final decree. Martin's claim was dismissed on the ground that he was a partner of the contractor and could gain nothing by his assignment except in subordination to the creditors. Distribution was decreed to the materialmen and laborers.

The Court of Appeals affirmed the decree. It based its ruling upon the ground that, apart from any assignment or any statute, the proceeds of a building contract are chargeable in favor of materialmen with an equitable

lien which attaches upon collection, even though not before, and which cannot be overridden at the will of the contractor by payment to his other creditors, though the payment be made in fulfillment of a promise.

The Supreme Court stated that the opinion of the Court of Appeals dwells upon the confusion in which the subject is enveloped and granted certiorari.

The Supreme Court said: "Our decision will be kept within the interests of the specific controversy here. Even so, the grounds chosen, though narrower than those assigned below, may be expected to be helpful as a guide in other cases. The proceeds of the contract, when collected by Martin under his power of attorney, were received by him with knowledge of the agreement between the contractor and the surety whereby such proceeds became a fund to be devoted, in the first instance, to the payment of materialmen and others similarly situated. In our view of the law, the equities in favor of materialmen growing out of that agreement were impressed upon the fund in the possession of the court."

The court referred to the Act of Congress with regard to the execution of transfers and assignments of any claim upon the United States, and said that the government did not require compliance with the statute, but turned over the money to Martin as Tobin's representative, thus discharging its indebtedness as effectively as if payment had been made directly to the principal. And the court said: "Will Martin be allowed to keep the proceeds in the face of his knowledge of the earlier assignment to the surety and of the promise that no assignment would be made to anyone else?" And the court also said: "A different question would be present if the surety were seeking to keep the money for itself. There is no such effort here. On the contrary, the surety, claiming nothing for itself, is devoting the full proceeds of the assignment to the satisfaction of the liabilities covered by the bond. Has the assignment been so obliterated through the condemnation of the statute that, when used by the surety in aid of such a purpose, it does not generate an equity worthy of recognition?"

The court also said: "An assignment ineffective at law may nonetheless amount to the creation of an equitable lien when the subject matter of the assignment has been reduced to possession and is in the hands of the assignor or of persons claiming under him with notice * * *. Far from defeating or

prejudicing the interests of the government, the recognition of the equities growing out of the relation between the contractor and the surety will tend, as already has been suggested, to make those interests prevail * * *. In what has been written we have assumed that the failure to pay materialmen was a default of such a nature as to impose a duty on the contractor to turn over the payments to the surety upon appropriate demand. There is argument to the contrary. According to that argument the moneys were to be assigned in the event of default in the performance of a contract between the contractor and the government, and not upon the failure to pay persons other than the government who had claims against the contractor for materials or labor. But the statute directs that a bond for the prompt payment of materialmen and laborers shall be executed by the contractor before the commencement of the work. Not only that, but the contract with the government, which was drawn in

the standard form, is a confirmation and adoption of the statutory duty. The terms of the bond are read into the contract and there is default in the contract when there is default under the bond.

"We conclude that Martin's interest in the fund was correctly held to be subordinate to the interests of other claimants. Without denying the possibility of arriving at the same conclusion, through other avenues of approach, we follow the pathway that has been marked in this opinion.

The decree should be affirmed."

Respectfully submitted,
WALTER W. DOWNS,
GEO. S. SHACKELFORD, JR.,
F. A. W. IRELAND,
CHARLES W. SELLERS,
GEORGE L. NAUGHT, *Chairman*.

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Report of Committee on Health and Accident Insurance

SINCE the last report of this Committee as published in the January, 1937, issue of the Journal, there have not been many decisions of more than ordinary interest in the field of accident and health insurance law.

The subject of autopsy is usually of more than passing interest. Much has been said and written on the subject. A nice annotation on it appears in 88 A. L. R. 984. Some recent cases involving policy provisions giving the insurance company the right and opportunity to make an autopsy in case of death serve to remind us of the necessity of prompt action and a careful attention to detail in attempting to exercise such a contractual right. Not infrequently is the attorney consulted by the adjuster when a sudden death occurs under such circumstances that an autopsy is indicated as the only way of determining the cause of death and thereby whether or not it was the result of an accident.

The Standard Provision, as found in practically all modern health and accident insurance contracts, is

"The Company shall have the right and opportunity to examine the person of the insured when and so often as it may reason-

ably require during the pendency of claim hereunder, and also the right to make an autopsy in case of death where it is not forbidden by law."

The Supreme Court of Massachusetts in *Hurley v. Metropolitan Life Insurance Company*, 5 N. E. (2nd) 16, has reiterated the universal rule that this provision "is a reasonable provision for the proper protection of the insurer against fraudulent claims, and also against claims which, although made in good faith, are not valid."

In the Minnesota case *Cavallero v. Travelers Insurance Company*, 267 N. W. 370, the demand for autopsy was not made until a month after burial, and it was held that such a demand was not timely and refusal of the demand did not justify a finding for the defendant.

The sufficiency of the demand as to timeliness and scope was before the Washington Supreme Court in the case of *Hemrich v. Aetna Life Insurance Company*, 63 Pac. (2nd) 432. The circumstances of that case raised a question as to the cause of death. The Company representative was instructed the next day after the death by his Home

Office to ask for an autopsy under the policy. The request was discussed by him with the attorney who represented the beneficiary, who said in effect that it was all right to have the autopsy, and he asked the Company representative for blanks for that purpose. The Company representative referred him to a certain physician and the physician, not fully comprehending the situation, furnished a form to be signed by the beneficiary so that she might indicate her consent that the hospital might make such an autopsy as it desired for a complete study of the pathological changes in the internal organs to complete the records in the case from a general scientific standpoint, so that future patients might benefit from the knowledge gained, all in accordance with a nation wide policy of advancement of medical science. The beneficiary's attorney presented this form to her, and she refused to sign it. Later that day in the absence of her attorney, a written request for autopsy was served upon the beneficiary. No explanation was given her at that time as to how this request differed from the previous one. The request neither fixed nor suggested a time for making the autopsy, nor gave any indication of the scope or extent of the examination desired to be made of the body. This request was refused by the beneficiary. It was held that although the policy gave the insurer the right to an autopsy, the demand for the autopsy must have been seasonably made, and reasonable as to time and scope; that under the circumstances of the case the reasonableness of the request was for the jury, and a judgment against the Company was affirmed.

These decisions surely point out the manner in which the contractual right to autopsy should be exercised—that the demand should be timely, that it should specify definitely that it is a demand for autopsy as provided for in the insurance contract—that so far as possible and practicable, the scope of the examination desired should be indicated, and that a time should be fixed or suggested.

The attention of the Committee has been drawn to a number of suits which have been filed under the Federal Declaratory Judgment Act since the decision in the case of *Aetna Life Insurance Company v. Haworth*, 57 S. C. 461. This is possibly due to the

apparent difference between the attitudes of the State Courts on the one hand and the Federal Courts on the other as was suggested in this Committee's report in the January issue of the Journal in commenting on the Spaulding case.

There have been several decisions involving the old question of what constitutes accidental means, and distinguishing between accidental injury and the injury or death from accidental means. There appears to have been no departure from the generally established rule. Two recent representative cases are *McGinley v. John Hancock Mutual Life Insurance Company* and *Metropolitan Life Insurance Company*, 184 Atl. 593, and the Georgia case of *American National Insurance Co. v. Chappellear*, 181 S. W., 808. In the *McGinley* cases death was due to the consumption of an unknown quantity of alcohol and ginger ale, and it was held that although the death was accidental, it was not death resulting from accidental means. The Georgia case involved a case of death of the insured in a prize fight or boxing contest, and in that case, too, the Court held that the death resulting from a blow struck in the course of the fight was not caused by accidental means.

On the question of proof of loss and particularly with reference to the necessity of furnishing proof of loss within the time required in the contract, the recent Texas case *McClain v. National Life & Accident Insurance Co.*, 96 S. W. (2nd) 836 is fairly representative. The insured sustained loss of eyesight. The contract required proof to be filed within ninety days. Proof was not made until about seven months later, and recovery was denied on that account.

A policy exception was upheld by the Court in *Moss v. Mutual Benefit Health & Accident Association* decided by the Supreme Court of Utah, 56 Pac. (2nd) 1351. The policy excluded disability resulting from insanity, but the plaintiff claimed the exemption was not applicable because the insanity was itself the result of a disease which was covered by the policy. The Court held that the language permitted no recovery because insanity, whatever its cause may have been, was specifically excluded by the terms of the contract.

Another case was reported on the proposition that it is the duty of the insured to submit to reasonable medical or surgical treatment in order to mitigate the loss. This was

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the case of *Deakter v. Mutual Life Insurance Company*, 12 Fed. Sup. 182. Disability was caused by hernia. It was claimed the disability was permanent and total, but it was held that if a simple operation could remove the disability, there could be no recovery.

The Committee believes that the foregoing cases are rather typical of recent decisions in this field of insurance law. If there has been any particular change in the trend of decisions

in this field, it appears to have been away from an ultra liberal construction of insurance policies, and in a direction generally favorable to the insurance companies.

Respectfully submitted,

JAMES R. MORFORD,
ALLAN E. BROSMITH,
RALPH F. POTTER,
D. A. MURPHY,
G. J. CLEARY, *Chairman*.

Report of the Committee on Workmen's Compensation and Unemployment Insurance

BACK in the horse and buggy days—before the advent of high speed production lines and sit-down strikes—we had what were termed *Employer's Liability* laws. In the early days they probably served well enough considering the hazards of employment then existing although it must be conceded that the injured employee had to make out a very clear-cut case in order to recover damages from his employer.

Later the rapid development of mass production brought on a soaring accident frequency and it became increasingly apparent that in good conscience the burden of these accidents should be shifted onto industry so that the cost could be made a part of the overhead expense.

At long last came *Workmen's Compensation* to relieve the situation and incidentally to provide new worries for the *casualty insurance* companies including those of us who do part of the worrying for them.

Workmen's Compensation

When a man bites a dog the item barks out at you from the public prints but when an employee trips over a box and develops *diabetes* or wrenches his back and becomes afflicted with *locomotor ataxia* these results are merely final links in an unbroken chain of causation—or so say our industrial commissions and courts in this enlightened age.

We hardly need point out to you that twenty years ago such decisions were viewed with dismay and consternation—but what was then regarded as unusual, extraordinary or bizarre has now become commonplace and certainly nothing to write home about. Thus has the coverage afforded by Workmen's Compensation been greatly extended even

where the law itself has survived attempts at enlargement.

From the outset Workmen's Compensation laws proved to be socially beneficent, but to make them more so the industrial commissions and the courts took unwarranted liberties and soon found ways to pay benefits which were never contemplated by the law-makers. Much emphasis was placed on the desirability of observing the *spirit* of the law—especially when a case very definitely failed to come within the *letter* of the law. Over a period of years Workmen's Compensation has become very elastic due to the injection of the proper spirit when necessary.

Indeed it has long been regarded as the *Big Bad Wolf* of insurance and while the laws have been criticised and their administration deplored many companies writing this class of business accept the theory that the cards are stacked to begin with.

Accordingly claims have often been handled in a perfunctory manner with a minimum of investigation, the easiest way being to turn them over to junior members of the adjusting staffs to *pay* or to *practice on* before the industrial commissions.

To be sure many compensation claims can be adjusted by correspondence alone but unless there is intelligent supervision and the potentially serious or doubtful claims promptly recognized so that necessary measures can be taken; the harmless looking claim may very quickly develop into an expensive proposition—when it is too late to do much about it.

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Although the more spectacular cases challenge our interest it is the *mine-run* of compensation cases that eat up the biggest share of the premiums. Here money can be saved or lost. Catch-as-catch-can rules may prevail but *time is of the essence*. This is where the man who is a seasoned adjuster with a knowledge of human nature as well as the law and a familiarity with the medical aspect of industrial accidents can apply his adaptable technique, obtain control of the situation, avoid litigation, minimize the loss and effect a settlement *that will stick*.

During the past year the legislative mills have been grinding and although many of the measures introduced have failed to pass; the determination to liberalize Workmen's Compensation laws generally is most apparent. For instance: Qualification for compensation under one bill would be contingent only upon disability arising in the course of the employment and no longer *out of it* as at present. This you perceive would open the door to all injuries due to assault or resulting from horse-play.

Another bill would allow the employee to select his own hospital and surgeon at the expense of the employer. This might not mean much in the case of individual employers but it would complicate the situation and vastly increase the loss ratio so far as the large corporate employers are concerned.

In one state an attempt was made to provide compensation for *pain and suffering*—what would an industrial commission do with this? In another state it was proposed that benefits be continued for life and increased to eighty percent of the average weekly wages. Think of it, only a *twenty percent* penalty for laying off work! The only redeeming feature was that the bill did provide a maximum of Twenty-five Dollars per week.

As the trend seems to be definitely upward with little rhyme or reason it is not surprising that the insurance companies have difficulty in promulgating rates that are adequate or reliable. Manifestly a compensation actuary is engaged in a guessing game and experience dictates that he be a pessimist. Unless through concerted efforts of the employers and insurance companies effective restraints can be imposed on the legislators we may reasonably anticipate an ultimate in com-

pensation not less than *one hundred percent* of the average weekly wages.

In view of the foregoing observations your Committee feels impelled to submit recommendations as follows:

I.

That compensation be limited to cover accidental injuries and well defined occupational diseases *arising out of* and during the course of the employment, to be determined in accordance with *strict legal principles*.

II.

That weekly compensation be fixed at a rate and subject to such maximum amount that it will not serve as an inducement for *malingering*.

III.

That the standards of efficiency in the investigation and adjustment of compensation claims be increased in order to minimize losses in the vast field of *unlitigated claims*.

IV.

That as to health and injuries not covered by compensation *Group or Mutual Benefit Insurance* be established or encouraged.

Unemployment Insurance

On May 24th, 1937 the readers of America were greeted with the following headline: "SOCIAL SECURITY LAW HELD VALID". On that day the United States Supreme Court held constitutional both the old age pension and unemployment insurance provisions of the Social Security Act.

This, to be sure, was received with more elation by the labor leaders and employees than by the employers and members of the legal fraternity who had studied the provisions of the Act and entertained grave doubts as to its constitutionality.

Conceived at the bottom of the depression it has been characterized as a poorly drawn law, unduly complicated, difficult to administer or comprehend, but *mirabile dictu!*—an enactment of monumental proportions probably affecting more individuals than any other legislative measure in all history.

Wholly aside from the constitutional questions that were involved many well informed people felt that this far-reaching piece of

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legislation was *ill-timed* and that it should have awaited a more general recovery and the establishment of the nation on a *sounder* financial basis. Indeed, the situation has been likened to that of a man who, finding himself impoverished, seeks to combat it by undertaking to support his needy relatives.

Be that as it may, unemployment insurance is *definitely* established and forty-five states as well as the District of Columbia have passed measures supplementing the Federal Act to protect more than *eighteen million* persons against future unemployment.

In our report of last year we set out a summary of such state laws as had then been enacted. This rather clearly indicates the manner in which the various state laws differ from each other and it will be noted that with few exceptions, compensation is limited to

\$15.00 per week or fifty percent of full time weekly wages—in the ratio of one week's compensation for each four weeks employment in the preceding two years; or subject to a maximum of fifteen or sixteen weeks in any one year.

Further analysis at this time, we believe, would be of little practical benefit for now that the law bears the stamp of approval of the Supreme Court we immediately enter an *open season* for the proposal of amendments, no few of which will be designed to bring exempted employments under the Act and thus make it *all-inclusive*.

J. C. HALL,
ROBERT M. NELSON,
MILTON H. SCHWARTZ,
HAL C. THURMAN.
ARTHUR L. AIKEN, *Chairman*,

Report of Committee on Unauthorized Practice of Law

DUE to pressure of work and the shortness of time, I have been unable to prepare and submit a complete report to the members of the Committee on the Unauthorized Practice of Law, of which I am Chairman. I am, therefore, submitting this merely as my own, with the plan of later preparing a more complete report and sending it to the members for their approval. It is, of course, possible that some of the views which I have expressed may not meet with the approval of the members.

The subject of unauthorized practice of law seems to have received more attention during the past year than at any other time. In practically every state Bar Associations have been actively engaged in instituting proceedings to prohibit laymen from continuing to perform work that is claimed to constitute the practice of law, or engaging in the law business. In previous years the attack has been largely directed against trust and title companies and collection agencies, but during the past year, while these activities have continued, more attention seems to have been given to lay adjusters (whether they are independent adjusters or salaried employees of insurance companies) and also against lay claim superintendents in the offices of insurance companies. The actions against lay adjusters have not only sought to prevent them from adjusting claims but also from ap-

pearing before referees hearing compensation claims under the Workmen's Compensation Laws.

Already final and conflicting decisions have been rendered in a few states. In Ohio, the Supreme Court held that an independent lay adjuster appearing before a referee hearing compensation claims is not practicing law, although one appearing before the appeal board, which hears appeals from the decision of the referee, is practicing law. In Illinois, on the other hand, the Supreme Court held that an independent adjuster appearing before a referee hearing compensation claims is practicing law. In Pennsylvania, an action was brought by a local bar association against a salaried lay adjuster of an insurance company to restrain him from appearing for his company before a referee hearing compensation claims, because it was claimed that he was practicing law. This case is now awaiting final decision by the Supreme Court of Pennsylvania. I believe this is the only case that has been brought against a salaried lay adjuster of an insurance company to prevent him from appearing before a referee under the Workmen's Compensation Law.

The fundamental purpose of Workmen's Compensation Laws, as has been stated in a number of decisions and is generally very well known, was to provide compensation to injured employees, regardless of fault, and a

simple and speedy method of determining claims without the expense of lawyers. The referees hearing the claims are not required to be lawyers; the usual rules of evidence do not apply, and the hearings are informal. Because the laws make provision for the state to look after the interest of injured employees at these hearings, it is not necessary for the injured party to have a lawyer in the usual case. If insurance companies believe that it is necessary for them to have lawyers to properly protect their interests in such informal proceedings, they naturally would do so. It, therefore, is difficult to see how the Bar Associations can justify their claim that in bringing such actions they are thinking only of the public good, which can be their only proper justification for seeking to exclude laymen from such work. It is doubtful if any group in the country employs lawyers to a greater extent than casualty and surety insurance companies, but if the views of some of the more militant leaders of the Bar are adopted by the courts, it will be impossible for these companies to have anyone except a lawyer perform much of the responsible work in their offices. One of the most active leaders of the Bar, in its efforts to eliminate lay adjusters and lay claim superintendents, has stated that the adjustment of casualty insurance claims, in his opinion, is the practice of law; that these companies doing business in his state must have the claims arising against policyholders handled, passed upon and adjusted by lawyers. In other words, he believes that every casualty company doing business in his state must maintain a lawyer claim department in that state or refer all claims arising against policyholders to lawyers in that state for disposition, including determination of liability. This would, he states, only permit counsel in the Home Office to review the opinion of the lawyers of that state and dictate the action of the company on the claims, but the company must have the aid and assistance of lawyers in that state. He further believes that while doing purely investigating and appraisal work is not the practice of law, yet those doing such work invariably perform other work which does constitute the practice of law, and for that reason, even these men should be supplanted by lawyers as soon as they leave the employ of the company for any reason.

This work which the Bar Associations seem so anxious to have done only by lawyers hardly appears to be such as will add to the

dignity of the Bar. It is true that it may provide employment for young law school graduates for a short time, when they will be anxious to leave for "greener pastures". On the other hand, laymen who do such work are willing to stay with the companies and advance with them. If the companies and claimants have found that laymen can perform such work without legal training, it seems to me that here again the Bar Associations are hardly able to justify their action on the ground of the public good. As to lay adjusters, it hardly seems correct to say that one who is sent out to investigate the facts of an accident is giving a *legal opinion* as to the company's liability, if, after obtaining the statements of witnesses and investigating the facts of the accident, he reports that, in his opinion, the insured was not *responsible* for the accident and, therefore, he and the company have no liability. Real questions of law, construction of policies, examination of laws and decisions bearing upon liability are, of course, referred to lawyers. If laymen cannot express an opinion on the facts as to who was *responsible* for an accident, it would seem that the law should also require that all jurors who may later determine the responsibility of the parties, upon which the liability of the insured and the company depends, must also be lawyers. Furthermore, if laymen are thus practicing law, it would appear that underwriters in company offices, and possibly agents and brokers, must be lawyers, for it is necessary that they advise applicants for insurance as to the provisions of policies and the company's liability. Also, if an insured has a loss, he usually calls upon his agent or broker immediately to take the matter up with the company and to advise him of his rights under his policy and to collect his claim. Only when it is rejected does he retain a lawyer. It is rather difficult to find one who does not have to be a lawyer when one attempts to apply fully the announced views of some of the Bar Association's leaders.

Perhaps the most intensive efforts to curb what is claimed to be the unauthorized practice of law have been made in Missouri, where a committee of lawyers appointed by the Supreme Court of Missouri has brought actions of various kinds against laymen and lay organizations who, in the opinion of the Committee, were practicing law. Among other actions brought are several against salaried lay adjusters and claim superintendents and the companies they represent. These actions

are now pending in the Courts of Missouri but will not be finally determined for some time.

Another important question involved on which the judges differ is whether the courts or the legislatures have the power to determine what is practicing law. Because the answer depends to a considerable extent on the provisions contained in the Constitutions of the different states, it is doubtful if there will be a unanimity of decisions on this point. In one case the Missouri Supreme Court en banc held, in substance, that the control and regulation of the practice of the law was a matter within the control of the Supreme Court in the exercise of the judicial power, but that the legislature might pass regulatory statutes in aid of but not to frustrate the judicial power. In a later case before the Supreme Court of Missouri en banc, one judge went a step further and held that the judicial power is exclusive of any legislative interference and that our statutes regulating the practice of law are unconstitutional and void as an encroachment on the judicial power. None of the judges concurred. Five of the judges in this case took an opposite view and held that the statutes concerning the practice of law constitute a valid constitutional exercise of the legislative power. The net result seems to be that while heretofore the court was unanimous in holding that the regulation of the practice of law was within the judicial power, but might be supplemented by legis-

lation, we now have a situation where five (or six) of the seven judges held that the practice of law may be regulated primarily by the legislature.

In the later report which I expect to prepare I will include decisions in other courts and also refer to other controversial points that are involved in this subject.

At the Mid-winter Meeting of the Executive Committee of the Association, a resolution was adopted authorizing the President of the Association to extend invitations to the Association of Casualty and Surety Executives and the American Mutual Alliance to each appoint a Committee of Three to confer and cooperate with a Committee of Three of the International Association for the purpose of formulating and defining the borderline activities acceptable to insurance companies and lawyers in which the insurance adjusters may and may not lawfully and/or ethically engage, and to appoint a Committee of Three from the International Association for the purpose of conferring and cooperating with the committees appointed by the two company associations. Committees were appointed by the various associations and for that reason there appears to be no necessity for the continuance of the Standing Committee on the Unauthorized Practice of Law. I accordingly, as a part of this report, make the suggestion that it be abolished.

HERVEY J. DRAKE, *Chairman.*

Report of the Committee on the Motor Carrier Act of 1935 and Rules and Regulations of Interstate Commerce Commission Promulgated by Authority of the Same

YOUR Committee on the Motor Carrier Act, 1935, and the Rules and Regulations of the Interstate Commerce Commission promulgated by authority of that Act reports as follows:

At the date of our last report to this Association, no Rules and Regulations had been promulgated under the authority created by Section 215 of the Motor Carrier Act, 1935, and, accordingly, your Committee pointed out that it was able to report on the effect of the Motor Carrier Act, 1935, only in the most general way. (See report of your Committee for 1936). An examination was made

of the statutes of all States of the Union relating to Property and Public Liability Insurance required of Motor Carriers operating in Interstate Commerce through those States. The object was to determine the existence or non-existence of such requirements and to exhibit the adequacy or inadequacy of those existing in order to suggest the probability or improbability of increasing opportunities for sales of Insurance Contracts. The report of your Committee for last year sets out the requirements of each State of the Union regarding Property Damage and Public Liability Insurance.

On August 3, 1936, the Interstate Commerce Commission promulgated the following Rules and Regulations fixing the amount of Cargo, Property Damage, and Public Liability Insurance required of Motor Carriers subject to the provisions of the Motor Carrier Act, 1935:

"Rule I

No motor carrier subject to the provisions of the Motor Carrier Act, 1935, shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to a motor carrier, or shall remain in force unless and until there shall have been filed with and approved by the Commission a surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as a self-insurer, or other securities or agreements in not less than the amounts hereinafter prescribed, conditioned to pay, within the amount of such surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as

a self-insurer, or other securities or agreements any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles under such certificate or permit, or for loss or damage to property of others; nor shall any common carrier by motor vehicle subject to the provisions of said Act engage in interstate or foreign commerce, nor shall any certificate be issued to such carrier, nor remain in force unless and until there shall have been filed with and approved by the Commission a surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as a self-insurer, or other securities or agreements in not less than the amounts hereinafter prescribed, conditioned upon such carrier making compensation to shippers or consignees for all property belonging to shippers or consignees and coming into the possession of such carrier in connection with its transportation service.

Rule II

The minimum amounts referred to in Rule I are hereby prescribed as follows:

A. Motor carriers—bodily injury liability—property damage liability.

(1)	(2)	(3)	(4)
Kind of equipment	Limit for bodily injuries to or death of one person	Limit for bodily injuries to or death of all persons injured or killed in any one accident (subject to a maximum of \$5,000 for bodily injuries to or death of one person)	Limit for loss or damage in any one accident to property of others (including cargo)
Passenger equipment (seating capacity):			
7 passengers or less	\$5,000	\$15,000	\$1,000
8 to 12 passengers, inclusive	5,000	20,000	1,000
13 to 20 passengers, inclusive	5,000	30,000	1,000
21 to 30 passengers, inclusive	5,000	40,000	1,000
31 passengers or more	5,000	50,000	1,000
Freight equipment: All motor vehicles used in the transportation of property	5,000	10,000	1,000

B. Motor common carriers—Cargo liability.

Security required to compensate shippers or consignees for loss of or damage to property belonging to shippers or consignees and coming into the possession of motor common carriers in connection with their transportation service, (1) for loss of or damage to property carried on any one motor vehicle—\$1,000; (2) for loss of or

damage to or aggregate of losses or damages of or to property occurring at any one time and place—\$2,000."

Cargo Insurance

Your Committee reported last year that it did not believe that any eventual rule of the Interstate Commerce Commission would alter the then existing situation in reference to Cargo Insurance in any great degree, owing to

the fact that virtually all Motor Carriers carry Cargo Insurance in an adequate amount even though no State can require Motor Carriers operating in Interstate Commerce to do so. It will be observed that the maximum amount of Cargo Insurance required for coverage on property "on any one motor vehicle" is \$1,000, and the maximum amount for coverage for damage "to property occurring at any one time or place" is \$2,000. We do not believe that this tends to elevate the amount of Cargo Insurance ordinarily carried by Motor Carriers.

Property Damage Insurance

Your Committee reported last year that Motor Carriers were not required to carry Property Damage Insurance in the District of Columbia or in the States of Delaware, Nebraska, Nevada, New Hampshire, New Jersey, and Vermont. A reference to the above table exhibits that Motor Carriers operating through those States and the District of Columbia must now carry Property Damage Insurance in the amount of \$1,000. Indeed, \$1,000 is the amount of coverage required for Motor Carriers operating in Interstate Commerce through any State of the Union. The States of Alabama, Arkansas, Colorado, Florida, Iowa, Kentucky, Maryland, Missouri, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming, all require Motor Carriers to carry Property Damage Insurance in the amount of \$1,000, and did so at the date of our last report, and we do not see that there has been any alteration in the preexisting situation by the promulgation of the Rules and Regulations of the Interstate Commerce Commission so far as these States are concerned. Motor Carriers in Michigan are required to carry \$3,000 Property Damage Insurance. Until the law of that State is altered, Motor Carriers operating in Interstate Commerce through that State must comply with its law, although the coverage required is in excess of that prescribed by the Interstate Commerce Commission. Motor Carriers are required to carry \$5,000 Property Damage Insurance in Arizona, California, Connecticut, Georgia, Idaho, Indiana, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Montana, Texas, Utah, Washington, and Wisconsin. The Rules and Regulations of the Interstate Commerce Commission do not

affect the requirements of the laws of these States, and Motor Carriers operating through them in Interstate Commerce are still required to carry \$5,000 Property Damage Insurance. Motor Carriers are required to carry \$10,000 Property Damage Insurance in Illinois and Louisiana, and the Rules and Regulations of the Interstate Commerce Commission will work no diminution of these amounts of coverage. Motor Carriers are required to carry \$5,000 or \$10,000 Property Damage Insurance in South Dakota, and this requirement will continue, of course, in spite of the Rules and Regulations of the Interstate Commerce Commission. Accordingly, it appears that the Rules and Regulations of the Interstate Commerce Commission in reference to the requirements for Property Damage Insurance affect the preexisting situation only in the District of Columbia and the States of Delaware, Nebraska, Nevada, New Hampshire, New Jersey, and Vermont, which States, as we have observed, have no statutes requiring Motor Carriers to carry Property Damage Insurance.

Public Liability Insurance

Your Committee reported last year that Motor Carriers were not required to carry Public Liability Insurance in the District of Columbia or in the States of Delaware, Nebraska, Nevada, New Hampshire, New Jersey, New York or Vermont. A reference to the above table exhibits that Motor Carriers operating through those States and the District of Columbia must now carry Public Liability Insurance varying in amounts from a minimum of \$10,000 to a maximum of \$50,000, "subject to a maximum of \$5,000 for bodily injuries to or death of one person." Indeed, these amounts of coverage are required for Motor Carriers operating in Interstate Commerce through any State of the Union. The States of Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Maryland, Massachusetts, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming, all require Motor Carriers to carry Public Liability Insurance providing coverage from \$5,000 to \$10,000, and did so at the date of our last report. It is obvious that the Rules and Regulations of the Interstate Commerce Commission will work a great alteration in the

preexisting situation so far as these States are concerned. In the remaining States the statutory requirements are higher than in those States just named, although only in Missouri and Illinois are they as high as those prescribed by the Rules and Regulations of the Interstate Commerce Commission. Clearly, therefore, the Rules and Regulations of the Interstate Commerce Commission have brought about an alteration in the preexisting situation in practically every State in the Union, and Motor Carriers desiring to qualify for Interstate Transportation will be required to procure additional insurance in order to obey the Rules and Regulations.

Your Committee predicted last year that the Rules and Regulations of the Interstate Commerce Commission would remedy the existing situation in the District of Columbia and in the States of Delaware, Nebraska, Nevada, New Hampshire, New Jersey and Vermont, and this has come to pass. Motor Carriers may no longer operate through the District of Columbia and those States without Cargo, Property Damage, and Public Liability Insurance.

Other Rules and Regulations of the Interstate Commerce Commission Affecting Cargo, Property Damage and Public Liability Insurance

A reference to the published Rules and Regulations "governing the filing and approval of surety bonds, policies of insurance, qualifications of a self-insurer, or other securities and agreements by Motor Carriers and brokers subject to the Motor Carrier Act, 1935," exhibits that the Interstate Commerce Commission has prescribed a set of forms which Insurance Companies must use in drafting their policies before the Insured can

qualify for Interstate Operation under the Rules and Regulations of the Interstate Commerce Commission. About 50 forms of indorsements, certificates, acknowledgments, etc., have been prescribed by the Interstate Commerce Commission under the authority conferred by Section 215, Motor Carrier Act, 1935, and no policy of insurance will be approved by the Commission unless it contains appropriate certificates, acknowledgments, and/or indorsements constituting compliance with the Rules and Regulations. These forms are too voluminous to be set forth in this report or even to be described. The Rules and Regulations, as well as all forms prescribed thereunder, may be purchased from the Superintendent of Documents, Washington, D. C., at 10 cents per copy. Insurance Counsel, of course, will desire to familiarize themselves with all Rules and Regulations and Forms and the 50 page booklet will be of great aid in this connection.

We do not believe that further comment is necessary to point out the manner in which Insurance Companies are affected by the promulgation of the Rules and Regulations of the Interstate Commerce Commission under the authority of Section 215, Motor Carrier Act, 1935. We have set forth the existing statutory law in each State and a comparison of this law with the table set forth above easily enables one having an interest to see the difference between the requirements incumbent upon Motor Carriers prior to the promulgation of the Rules and Regulations and after the promulgation of the same.

WILLIAM A. PORTEOUS, JR.
W. PERCY McDONALD,
LON O. HOCKER,
FRED G. WARREN,
JAMES T. BLAIR, JR., *Chairman*

Report of the Committee on Safety

THIS committee was created last year because of the strong feeling of the president and the members of the Executive Committee of the Association that our members had, from the nature of their experience and the character of their regular work, an intense and real interest in the problem of traffic safety. After organization, the committee felt that its first task was to analyze the

basic essentials of the problem in an effort to find out in what direction the efforts of the Association might be most profitably employed, and secondly, to determine what other organization or groups are now working on

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tively on the problem, so that our efforts might not duplicate theirs but might be used to reinforce and supplement them. The members of the committee have given the problem much individual thought and they have held a joint meeting with the Committee on Automobile Insurance Law of the Insurance Section of the American Bar Association, also working in this field. Their conclusions, based on a study that was unfortunately neither as comprehensive nor as thorough as the members of the committee would like, are as follows:

1. The answers to the traffic safety problem are known, the difficulty is in securing their application. It would be possible to construct a model program for any community or any state on the basis of the research which has been conducted and the studies which have been made which could be guaranteed to reduce the toll of traffic accidents to a small fraction of those which now occur. Such a program cannot be carried through on a comprehensive basis because its cost would be too high, both in money and in the surrendering by the individual of freedom of action. It would involve a complete reconstruction of our highway system and a complete plan for traffic control in our cities, including adequate mechanical equipment such as stop lights and traffic signals and adequate personnel. It would involve the creation of an accident prevention division or bureau in our police departments and the proper training of traffic officers and other policemen in the fundamentals of the safety problem and the proper technique for the handling of their part of it. It would involve a complete reform, in most jurisdictions, of our traffic court procedure, which would include adequate safeguards against the fixing of arrest slips for traffic violations and proper penalties for those guilty of traffic offenses. It would involve, in most states, a substantial rewriting of the laws governing traffic and the licensing of drivers, to bring them up to the standard of the Uniform Vehicle Code. It would involve an educational campaign which would reach from the children in kindergarten to the oldest surviving pedestrian, with special emphasis on all of those who drive automobiles. It would involve the creation of public opinion which would support the law enforcement officials in their

efforts to see that the laws are obeyed; which would secure the approval of adequate appropriations for highway modernization and the removal of dangerous conditions; and which would, in the last analysis, make the traffic criminal feel that he had committed a wrong even though he were not caught. The American public is not yet ready to pay the price of such a campaign in whole. It is willing to approve individual parts of it and progress is being made, even though the thousands of dead and dying testify to the fact that it is deplorably slow.

2. Your committee found that there are already a large number of organizations actively at work on the problem of greater traffic safety. The list is far too long for repetition here but some mention should probably be made of the National Safety Council, which has been in the forefront of this movement for years, and the National Conference on Street and Highway Safety which served for many years as a clearing house of those organizations which were working in the field. The automobile manufacturers, in order to make more effective their campaign in this field, have recently organized the Automotive Safety Foundation which will act for the entire automotive industry in all matters pertaining to highway safety and administer the sizable fund voted by the car makers to further safety campaigns. Public organizations, such as the Bureau of Motor Carriers of the Interstate Commerce Commission and the Bureau of Public Roads, have done much effective work. Scores of others, including both insurance company organizations and the individual companies themselves, have added their bit to the great campaign to bring home to the public the seriousness of the problem and the best approaches to an effective solution.

3. The most obvious point of attack for a legal group was, of course, from the standpoint of enforcement, particularly traffic court procedure. Your committee found that this question is already being given serious study by the Automobile Insurance Law Committee of the Insurance Section of the American Bar Association. This committee of the American Bar Association is

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considering the advisability of a complete survey of traffic court procedure which would include such questions as the proper penalties for various types of traffic violations; the question of educational sentences, such as visits to hospitals and morgues and terms in a school for correct driving; and the advisability of having a cafeteria court, where fines may be paid for traffic violations without the formality of an appearance before a judge or magistrate. Since a survey of this kind would be an ambitious project and one which would be of deep concern to all members of the Bar, it is your committee's opinion that it can be best handled by the American Bar Association and that our members should give the project their united support.

4. Last of all, it is your committee's opinion that our organization can be of most assistance in this field through the efforts of its individual members rather than through an association program. We have therefore, at the direction of the Executive Committee, prepared a program for this

meeting which is intended to bring home to all of those present some realization of the scope of the problem and the various attacks which are being made upon it. Each member of our association should feel a real obligation to give his personal assistance to every movement in his own community intended to further the cause of greater safety. Our committee can function most effectively by acting as a source of material for our members so that they can secure from it at any time information with reference to any aspects of the problem which will be of assistance in their own communities.

DOUGLAS HUDSON,
C. DONALD SWARTZ,
C. F. MERRILL,
WM. O. REEDER.
AMBROSE B. KELLY, *Chairman*.

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Report of Special Life Insurance Committee

THIS special committee was appointed during the past winter for the purpose of interesting Home Office life insurance counsel in the work of our Association.

The failure of General Counsel of life insurance companies to become members of our Association is not due to a lack of interest in the Association or indifference to its purposes, but is chiefly due to the fact that these attorneys have their own organizations which meet regularly once or twice a year, namely, the Legal Section of the American Life Convention and The Association of Life Insurance Counsel.

We feel, however, that in spite of the many

difficulties we can report definite progress. A number of these attorneys have assured us that they will attend the next meeting of our Association at White Sulphur in August to become better acquainted with the members of our organization. We believe that the attorneys attending this meeting will see that the Association performs many services for life insurance companies and is well worthwhile, and that thereafter they will join with us and work to advance the interests of insurance companies generally.

Respectfully submitted,
W. CALVIN WELLS, III,
Chairman.

The Effect on the Surety's Obligation of the Fact that the Principal Does Not Become Bound to the Obligee

By JAMES A. DIXON
Miami, Florida

THE statement is frequently made that the surety is not bound unless the principal is bound, or in another phrase, that the surety is entitled to any defense available to the principal. It will be the purpose of this paper to examine into the accuracy of this "rule", and to indicate the state of the law relating thereto. It will not deal with situations where the principal acquires a defense by reason of facts arising after the contractual relation has been assumed with the obligee; it will be limited to those situations in which, by reason of prior facts, the principal never becomes bound to the obligee, or has a "defense" based on facts occurring prior to or simultaneously with the inception of the undertaking. Seven situations are treated, although, it will be observed hereafter, some overlap to some extent upon the others. These seven situations are: (1) The principal is non-existent; (2) the principal does not sign the contract; (3) the principal's name is forged; (4) the principal is under disability; (5) the principal's promise is obtained by fraud or duress; (6) the principal is not bound because the contract is ultra vires the principal or the agent purporting to act for him; (7) the principal's undertaking is usurious or otherwise unenforceable because of illegality.

THE PRINCIPAL IS NON-EXISTENT. Although there are text statements (1) and (2) to the effect that there must be an existent principal as an essential to the suretyship relation, there is little, if any, direct authority on the point.

In the recent Florida case of *Florida School Book Depository v. Liddon* (3), the court treated the bond involved as though the principal were non-existent or fictitious, though, from the facts this was scarcely necessary. In that case, a contract performance bond named the principal as "Golden Rule Department Store" and these words had been signed by someone at the foot of the bond, with no indication as to the identity of the signer, or the legal nature of the department store. The Court said:

"Sureties upon a bond may be bound though the principal be not bound because the principal named is fictitious or because the principal is under some legal disability prohibiting his being bound as such. *Cozine v. Randolph*, 71 Fla. 603, 72 So. 177. The rule is that one who signs as surety warrants the existence and validity of the obligation of the party named as principal. This is so, although it may transpire that one or more of the signatures of the principals are forged. 8 A. S. R. 247, note."

The correctness of the law stated in this quotation is subject to contradiction in several particulars as will subsequently appear herein. It may be guessed that the name "Golden Rule Department Store" was a trade name under which some individual or partnership was doing business, and as the decision in this case eventually went off upon the point that the bond contained blanks rendering it void as without conditions, the language quoted was unnecessary. Neither of the authorities cited by the court is in point upon the effect of the non-existence of the principal, as they deal with cases where the principal is under disability, or for some other reason the contract is void or voidable by an existent principal.

Although no cases have been found, it is possible to conceive of circumstances where an obligation of suretyship is assumed for a non-existent principal. For instance, A, a business man of San Francisco, procures certain checks drawn by him and payable to him to be certified by his bank in that city; while on a business trip to New York, he is induced by fraud to indorse and deliver these checks to third persons; while still in New York, he learns of the fraud and endeavors to stop payment of the checks; the bank refuses to do so unless it receives a bond of indemnity signed by A and his friend B; by phone A arranges to have B sign the bond; it is prepared and signed by A in New York and forwarded by mail to B with the request that

he execute as surety and deliver the bond to the bank; before the bond is received by B, A dies, but B, in ignorance of this fact, signs and delivers the bond to the bank, which is also ignorant of A's death; the bank is forced to pay the checks in the hands of a bona fide purchaser. Is B liable on the bond as a warrantor of A's existence, as suggested by the Supreme Court of Florida? Or is B entitled to rescission because of a mutual mistake of fact?

Other instances might be stated, but this indicates the possibilities.

THE PRINCIPAL DOES NOT SIGN THE CONTRACT. This situation overlaps somewhat with those where the principal's name is forged, or where it is signed by an agent without authority to do so.

The authorities seem to be in hopeless conflict. The cases are collected in notes in 12 L. R. A. (N.S.) 1105, Ann. Cas. 1912 A. 1014, Ann. Cas. 1917 C 1073, 90 A. S. R.

The most reasonable rule seems to be that if the principal is not bound by the writing signed by the surety, or by separate contract, or by other legal duty, the surety is not bound, but if the principal is liable in any of these ways, the surety is liable.

The cases chiefly base their conclusions upon the expressed or assumed intention of the surety, i. e., if he expressly stipulates he shall not be bound unless the principal signs, this is regarded as a condition precedent and given effect, and if, by words or conduct, he indicates his intention to be bound without the principal's signature, he is held. In between these two cases, lie the great majority of the reported cases, where the general rule is applicable. If the principal is otherwise bound, the courts regard the surety's rights of subrogation and indemnity as preserved, and he is therefore in almost the same circumstances as though the principal had signed; the courts, or at least the majority, therefore, "assume" that he intended to be bound, even though the principal's signature is lacking. On the other hand, if the case is such that the principal is not otherwise bound, it is "assumed" that the surety did not intend to be bound, as the rights of subrogation and indemnity do not exist.

It is doubtful whether the true suretyship relation exists when the surety consents to

be bound without any obligation whatever upon the part of the purported principal, unless some agreement to that effect exists between them.

THE PRINCIPAL'S NAME IS FORGED. This situation overlaps somewhat with that arising when the principal's name is signed to the suretyship contract by an agent without authority to bind the principal. No attempt has been made to cite the cases, which are numerous, dealing with the forgery of the signatures of prior or subsequent co-sureties. The majority of the small number of cases dealing with the forgery of the principal's name, hold that the surety is liable notwithstanding the non-liability of the principal (4). This result is reached, sometimes upon the theory that the surety warrants the genuineness of the principal's signature, and sometimes upon the theory that the surety "admits", (probably "represents" is more accurate) at the inception of the obligation, the genuineness of the principal's signature. This distinction did not play an important part in the cases cited, but it is possible that it might vary the result to be reached under certain circumstances. If the warranty theory prevails, the liability is primarily contractual, and would not seem to require knowledge of the representation, reliance thereon and change of position which would seem to be necessary if the surety's liability is based upon an estoppel arising from the "admission" or representation. At least two cases (5) deny the liability of the surety under these circumstances.

THE PRINCIPAL IS UNDER DISABILITY. This point is covered in an exhaustive note in 24 A. L. R. 838, which is supplemented in 43 A. L. R. 589. For this reason, no citation of cases will be made, and the note merely summarized. The general rule seems to be that the disabilities of coverture, infancy and insanity on the part of the principal do not relieve the surety of liability.

The rule seems to be subject to one exception, occurring when the principal avoids the transaction and restores the status quo. Under these circumstances the surety is not liable.

Other cases contain a suggestion that if the surety is justifiably ignorant of the disability, he is not liable, but this position is denied by others.

Few of the cases seem to have considered the rights of the surety after he has been compelled to discharge the debt. Is he en-

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titled to be subrogated to other securities pledged by the principal or other person with the creditor as additional security, in the absence of affirmative action by the principal to avoid the transaction? Is the surety entitled to reimbursement out of property placed in his hands by the principal to indemnify him against payments he may be compelled to make? At least one case (6) allows the surety to obtain indemnity from his infant principal by action after payment to the creditor, where the contract was not avoidable because it was for the purchase of necessities.

A variation of this situation occurs when the principal is *sui juris*, but because of the common law rule that husband and wife cannot contract with each other, or that marriage destroys the liability of the husband upon prior contracts with his wife, the husband's obligation is unenforceable. The surety upon such a contract is nevertheless liable (7).

The most common reason given for the results actually reached in the cases is that the "defense" of disability is personal to the individual affected. This seems unsatisfactory, as it amounts to no more than a restatement of the rule in other words.

We may ask, does the surety warrant the contractual capacity of the principal? Does he "represent" that the principal has contractual capacity? Or does he undertake to be bound for the debt regardless of whether the principal has contractual capacity? Neither of the three theories jibe with all the cases.

If the warranty theory is adopted, the surety would seem to be properly liable to the creditor, at least for nominal damages, even if the principal avoids the transaction and restores the status quo. No decision to this effect has been found. It may some day arise when a different statute of limitation is applicable to implied warranties and written contracts.

If the representation theory prevails, then if the surety is ignorant of the disability and the creditor knows of it, the surety should not be held, for equitable reasons.

If the "absolute undertaking" theory controls, the surety should not be released, even by a release of the principal under seal and upon consideration, or by an avoidance by the principal accompanied by a restoration of the status quo.

THE PRINCIPAL'S PROMISE IS OBTAINED BY FRAUD OR DURESS. Fraud and duress have

the same effect upon the principal's contract (8), in that in either event he has the option of affirming the contract and taking the fruits of the transaction, or of disaffirming the contract and avoiding liability thereunder. The courts have not, however, treated fraud and duress practiced on the principal as having similar results upon the surety's undertaking. This makes it necessary to consider these elements separately.

FRAUD. The effect upon the surety of fraud practiced by the creditor to obtain the principal's promise is considered in an excellent note in 3 A. L. R. 865, where the cases are to be found. The rule gathered therefrom is to the effect that the surety may avoid liability if the principal either has exercised his option to withdraw or is reasonably certain to do so, but that if the principal elects to waive the fraud and abide the results of his bargain, the surety must likewise be bound.

Where principal and surety are sued together, and the principal defends on the ground of fraud the courts have had no hesitancy in allowing a similar defense to the surety. The chief difficulty has arisen when the surety is sued alone. In the absence of evidence of the principal's avoidance, the judges have struggled with the dilemma of choosing between giving judgment in favor of the surety, thereby depriving the creditor of part of what he bargained for in the event of the principal's subsequent affirmation, and giving judgment against the surety and thereby imposing, indirectly, liability upon the principal through the surety's right to indemnity, in a transaction which may subsequently be disaffirmed. When it is proven that the principal has elected to avoid the contract because of fraud, or when it is reasonably certain that he will do so, the same defense is permitted to the surety, with little difficulty, even when he is sued alone.

It has been suggested by one text writer (8a) that the obligee's concealment of the fraud practiced upon the principal constitutes a separate and distinct fraud upon the surety, in that it exposes him to a hazard, material to the risk but unknown to him, and for this reason, the surety should be allowed to avoid, even though the principal affirms. This view seems not to have been considered by the courts.

It should be noted that the fraud which will relieve the surety must have been practiced upon all the principals, if there are more

than one, or at least that all must have elected to avoid the contract (9).

DURESS. The question of the effect of the principal's affirmation of the contract when obtained through duress seems not to have been injected into the cases where the surety sought to avoid liability upon this ground, probably for the reason that few, if any, principals have elected to affirm contracts thus procured.

The rule at common law was that the defense of duress was personal to the principal and constituted no bar to a suit against a surety. In *Robinson v. Gould*, 11 Cush. (Mass.) 55, it was said:

"The general rule of law is well established, on reasons of justice and sound policy, that contracts, in order to be valid and binding, must be the result of the free assent of the parties. Therefore, duress, either of actual imprisonment or per minas, constitutes a good defense to an action on a contract in behalf of those from whom contracts have been thus extorted. . . . It is also well settled that the duress, which will avoid a contract, must be offered to the party who seeks to take advantage of it. . . . And certainly this distinction rests on sound principle. He only should be allowed to avoid his contract, upon whom the unlawful restraint or fear has operated. The contract of a surety of his own free act, and executed without coercion or illegal menace, should be held binding. The duress of his principal cannot affect his free agency or in any way control his action. It may excite his feelings, awaken his generosity, and induce him to act from motives of charity and benevolence towards his neighbor; but these can furnish no valid ground of defense against his contract, which he has entered into freely and without coercion."

Cases so holding also seem to have overlooked the possibility that by so holding they have enforced the contract against the principal, actually though indirectly, through the surety's right to indemnity against the principal. This is probably the reason why later cases seem to relax this rule, and to admit of three exceptional cases in which the surety is

relieved because of the duress exerted on the principal:

(1). Where the surety was ignorant of the fact of the duress or of the illegality of the imprisonment constituting the defense.

(2). Where the duress consists of some unwarranted exaction by a public official.

(3). Where the surety is a close relative of the person on whom the duress is effected, the mental suffering thus aroused by ties of blood or kinship being regarded as a sort of vicarious duress upon the surety himself.

The following cases may be consulted, together with the note appended to the last mentioned: *Oak v. Dustin*, 79 Me. 23, 7 Atl. 815, 1 A. S. R. 281; *Perry v. Honsley*, 14 B. Mon. (Ky.) 474, 61 Am. Dec. 164; *Gaines v. Poor*, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; *Patterson v. Gibson*, 81 Ga. 802, 12 A. S. R. 356; *Fountain v. Gibson*, 235 Pa. St. 35, 84 Atl. 131, Ann. Cas. 1913 D 1185.

These three exceptions are not recognized in all states, however.

THE PRINCIPAL IS NOT BOUND BECAUSE THE CONTRACT IS ULTRA VIRES THE PRINCIPAL OR THE PRINCIPAL'S AGENT. Where the principal's name is signed to the contract by an agent without power to bind the principal in this respect, the weight of authority is that the surety is bound notwithstanding the non-liability of the principal (10). There is at least one case to the contrary (11).

The same result is reached where the principal is a public or private corporation, which is not bound because the attempted contract is ultra vires (12). The courts have not yet passed upon the effect upon the surety's promise of statutes suspending the corporate powers of the principal, or of defects in the organization of the supposedly incorporated principal rendering it legally non-existent as a corporation. There seems to be no reason to expect a result different from that reached in respect to ultra vires contracts.

Whether the designated principal is not bound because the agent exceeded his powers, or because the act was ultra vires the corporate principal, the courts bottom their opinions upon the surety's so-called warranty or representation of the agent's or the principal's power to enter into the particular contract.

The line drawn between contracts which are merely ultra vires the corporate principal and those which are illegal, is not clearly drawn in the cases, particularly when public corporations are involved.

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THE PRINCIPAL'S UNDERTAKING IS USURIOUS OR OTHERWISE UNENFORCEABLE BECAUSE OF ILLEGALITY. The rule that usury in the principal's contract, to the extent that it relieves the principal, likewise relieves the surety, is amply annotated in 70 A. L. R. 353. The only exception seems to be in the case where the principal is a corporation forbidden by statute to plead usury. These statutes are construed by the courts as purging the transaction of its usurious taint, and the surety is liable. 6 A. L. R. 586.

Where the principal's contract is illegal by common law or statute to such an extent that it cannot be enforced against the principal, the surety is likewise free of liability thereon (13). Of course, not every illegality will relieve the principal (14).

In both instances, the determining factor in the decisions is the refusal of the courts to aid an evil plaintiff or an evil purpose rather than a consideration of the effect of the contract upon either the principal or the surety. For this reason, there is seldom any discussion in the opinions of the possibility that the principal or surety stand on any different footing in cases of this kind.

CONCLUSION. From the cases and notes cited above, it can be seen that so far is it from being true that the surety is bound only when the principal is bound that the contrary proposition can be advanced with greater support from the cases.

The only case in which it can be said, without exception, that the surety is not bound if the principal is not, is that where the enforcement of an illegal contract is involved, and here the ratio decidendi is wholly apart from any principles of suretyship. The courts tend, in all other situations, to hold the surety liable even when the principal is not.

Why is this so? It has been suggested (15) that if the principal's non-liability is caused by the obligee, without the knowledge of the surety, the surety should not be bound, but that in other instances, he should be bound. By this writer this theory is placed upon the ground that such conduct on the part of the obligee constitutes a separate fraud upon the surety; it may, however, with equal justice, be referred to the ground that the obligee's conduct has had the effect of impairing or destroying the surety's right to be subrogated to the obligee's cause of action. But neither ground will wholly explain the cases.

We may conclude, tentatively, that the courts, being human, have done what people ordinarily do, that is, they make decisions and then find reasons which may not in all instances be consistent. Perhaps a rationale may some day be found which will refer the results to a single principle.

- (1) 50 C. J. p. 16, N. 55-56.
Brandt on Suretyship, Sec. 163;
Rowlatt on Prin. & Sur. p. 1;
Arnold on Suretyship, Sec. 35.
- (2) Bernd v. Lynes, 71 Conn. 733, 43 Atl. 189;
Gordan v. Russell, 98 Kan. 537, 158 Pac. 661;
Lasee v. Crawford, 5 S. W. (2d) 105 (Mo.);
Russell v. Failor, 1 Oh. St. 327, 59 Am. Dec. 631;
Tulsa First National Bank v. Baxley, 129 Okla. 159, 264 Pac. 184.
- (3) 153 So. 902.
- (4) Morris Plan Co. v. Adler, 213 N. Y. S. 227;
Chase v. Hathorn, 61 Me. 505;
Fretwell v. Carter, 78 S. C. 531, 59 S. E. 639;
- (5) Talbott v. Carroll, 52 Ark. 437, 12 S. W. 1071;
Green v. Kindy, 43 Mich. 279, 5 N. W. 297.
- (6) Conn. v. Coburn, 7 N. H. 368, 26 Am. Dec. 746.
- (7) Bolyard v. Bolyard, 91 S. E. (W. Va.) 529, and cases cited in note appended thereto in L. R. A. 1917 D 445.
- (8) American Law Institute's Restatement of Contracts, Sec. 499.
- (8a) Arant on Suretyship, Sec. 45.
- (9) Kirley v. Spiller, 83 Ala. 481.
- (10) Klein v. German Bank, 69 Ark. 140, 61 S. W. 572, 86 A. S. R. 183;
Maledon v. Leflore, 62 Ark. 387, 35 S. W. 1102;
McKibben v. Fourth National Bank, 32 Ga. Ap. 222, 122 S. E. 891;
Farmers Bank v. Harrison, 12 S. W. (2d) 755 (Mo.);
Luce v. Foster, 42 Neb. 818, 60 N. W. 1027;
Weare v. Sawyer, 44 N. H. 198;

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- Millins v. Shafer, 3 Denio 60 (N. Y.);
 Stewart v. Behm, 2 Watts 356 (Penn.).
- (11) Dale Bros. v. Cosmopolitan Packing Co. 167 Mass. 481, 46 N. E. 105, 57 A. S. R. 477.
- (12) See cases collected in Note III, d., in 24 A. L. R. 838, and the following:
 Perkins v. State, 130 Miss. 512, 94 So. 460;
 Lionberger v. Kreiger, 88 Mo. 160;
 Morris Canal & Banking Co. v. Van Vorst, 21 N. J. L. 100;
 East Side Credit Union v. Leiman, 221 N. Y. S. 1;
 (13) U. S. F. & G. Co. v. Charles, 131 Ala. 658, 31 So. 558, 57 L. R. A. 212;
 William-Hester Co. v. Walton, 22 Ga. Ap. 433, 96 S. E. 269;
- Blair Milling Co. v. Fruitiger, 113 Kan. 432, 215 Pac. 268; 32 A. L. R. 416 (dicta);
- Schoun v. Brandt, 116 Md. 560, 82 Atl. 551;
- Gorham v. Keyes, 137 Mass. 583;
 Board of Education v. Thompson, 33 Ohio St. 321;
- Besnigh v. American Mfg. Co. 174 N. C. 206, 93 S. E. 734;
- Goodwin v. Kent, 201 Pa. 41, 50 Atl. 290;
- Mound v. Barker, 71 Vt. 253, 44 Atl. 346, 76 A. S. R. 767.
- (14) American Law Institute's Restatement of Contracts, Sec. 598-609.
- (15) Arant on Suretyship, Sec. 47.

Insurer's Liability—Occupational Diseases

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IS an Insurance Company liable to its assured under the Standard Workmen's Compensation and Employers' Liability Policy for damages recovered by an employee based on the contraction of an occupational disease, where not compensable under the Workmen's Compensation Law and when there is no endorsement on the policy covering occupational diseases?

In considering this question and its answer it must be remembered that when compensation laws were first enacted in our country, one, among other of the underlying principles, was that these laws were to be substituted for the common law in Master and Servant cases. That is to say, the remedy when a servant was injured or killed in his employment by an accident was to be determined by this new system of compensation instead of the former remedy at common law for injuries by accidents in employment.

In the beginning compensation laws were framed primarily and intended only to cover injury or death caused by an accident. Because of the rapid strides of industry with its attending complexities, occupational diseases began to be a new source of disablement or death. If the disease itself was not new, it became more pronounced and recognizable as

an occupational disease. In addition, there developed new occupational diseases because of exposures to new hazards.

Later some compensation laws were amended to include by schedule specific occupational diseases. Other compensation laws not so amended were by court decisions held, because of their language, to be broad enough to include occupational diseases as compensable, although these laws seemed reasonably to apply only in cases of "accidents". This interpretation was made despite the fact that these compensation laws were a substitute for the common law, and at common law there never was a remedy for any occupational disease. Lord Buckmaster, of England, in discussing this subject as to whether there was a remedy at common law where a man was engaged in work hazardous to his health and is thereby disabled, said:

"My Lords, cases of this kind are always painful to consider and hard to decide. A man is engaged in work hazardous to health and it may be to life itself. Death may ensue and yet, so far as the common law is concerned, there is no remedy".

Innes or Grant v. G. & G. Kynoch (1919)
 Vol. 9—p. 478—British Ruling Cases.

The Supreme Court of the State of Michigan in 1914 had before it a fatal case (*Adams v. Acme White Lead and Color Works*, 148 N. E. 485) involving lead poisoning. In considering that case the court said that enactment of Workmen's Compensation Acts had for its object more just and humane laws to take the place of the common law remedy for compensation of workmen for accidental injuries received in the course of their employment, by the taking away and removal of certain defenses in that class of cases; that the terms "personal injury" and "personal injuries" refer to common law conditions and liabilities and do not refer to and include occupational diseases, for there was no right of action for injury or death due to occupational diseases at common law, but, generally speaking, only a common law remedy for accidents, or rather accidental injuries gave the right of action. The court also pointed out its inability to find a single case where an employee had recovered compensation for an occupational disease at common law.

The Illinois Supreme Court in 1936 had before it a case (*McCreery v. The Libby-Owens-Ford Glass Co.* 2 N. E. (2nd) 290) in which the employee filed a common law action against his employer based on negligence and failure to provide reasonable devices to eliminate dust, causing Pneumoconiosis, an alleged occupational disease. The plaintiff alleged negligence and failure on the part of the employer to furnish the plaintiff with a reasonably safe place in which to work; that there were no proper suction fans and no reasonable masks or respirators provided. The defendant moved to dismiss, the basis of the motion being that the complaint did not charge the defendant with having violated any statute of the State of Illinois; that in the absence of a statute, defendant was not liable to the plaintiff for contracting an occupational disease; that such an injury was one for which the employer would not have a common law liability. This motion was sustained by the trial court, affirmed by the Appellate Court and subsequently by the Supreme Court.

NOTE: Previous to the *McCreery* case the Supreme Court of Illinois in 1935 decided in several cases (*Parks v. Libby-Owens-Ford Glass Co.*, 195 N. E. 616, and *Boshuizen v. Thompson & Taylor Co.*, 195 N. E. 625) that Section 1 of the Illinois Occupational Diseases Law, passed in 1911, which provided that every employer carry-

ing on work that may produce any peculiar illness must provide reasonable and approved devices, means or methods for its prevention, was unconstitutional.

Hence, in the *McCreery* case (*supra*) the plaintiff not being enabled as a matter of law to recover for the violation of the statute, because it was unconstitutional, endeavored to seek redress at common law. The court pointed out, after reviewing the grounds upon which it previously held Section 1 of the Occupational Diseases Law of Illinois was unconstitutional, that the common law required the employer to furnish his employee a reasonably safe place in which to work, but that a "safe" place did not imply or mean a "healthful" or "sanitary" place. The right of recovery at common law for an occupational disease was denied. The court also stated that the matter of occupational diseases has neither common law history nor origin, citing—

Parks v. The Libby-Owens-Ford Glass Co. (Ill. 1935) 195 N. E. 616.

Boshuizen v. Thompson & Taylor Co. (Ill. 1935) 195 N. E. 625.

See also—

Miller v. American Steel & Wire Co. (Conn.-1916) 97 Atl. 345;

Zajachuck v. Willard Storage Battery Co. (Ohio-1922) 140 N. E. 405;

Industrial Commission of Ohio v. Monroe (Ohio-1924) 146 N. E. 213;

Gordon v. Travelers' Insurance Co. (Tex.-1926) 287 S. W. 911;

Ewers v. Buckeye Clay Pot Co. (Ohio-1928) 163 N. E. 577;

Calhoun v. Washington Veneer Co. (Wash. 1932) 15 Pac. (2nd) 943;

Webb v. Tubize-Chatillon Corp. (Ga.-1932) 165 S. E. 775;

Sylvester v. The Buda Co. (Ill.-1935) Ill. App. Ct.—July 5, 1935;

McCreery v. The Libby-Owens-Ford Glass Co. (Ill.-1936) 2 N. E. (2nd) 290;

McGuire v. The Sherwin-Williams Co. (Ill. 1936) 87 Fed. (2nd) 112;

Vogel v. The Johns-Manville Co. (Ill. 1936) 2 N. E. (2nd) 716;

Mozingo v. Marion Steam Shovel Co. (Ohio 1936) 200 N. E. 756, 57 S. Ct. 12.

Therefore, in States following the rule laid down in *Innes* or *Grant v. G. & G. Kynoch*,

supra, where it has been held that there is no liability of the employer for occupational disease under the common law, it follows logically that under the terms of the policy the insurance carrier is not liable.

There is a distinction between a suit at common law for damages because of an occupational disease contracted in the employment and damages claimed in an action at law because of a disease contracted in the employment, based upon the failure of the employer to comply with statutory requirements.

McCreery v. Libby-Owens-Ford Glass Co. (Ill.) 2 N. E. (2nd) 290;

Schmidt v. The Merchants Despatch Corp. (N. Y. 1936) 200 N. E. 824.

As to the liability of the employer predicated on the failure of the employer to comply with statutory requirements, many of such statutes were drawn and enacted not in the light and with the knowledge of changed and changing conditions. These statutes may be too general, inapplicable, indefinite, uncertain, and leave too much to speculation and doubt, as to the employers and employees bound by these statutes. Because of this uncertainty and lack of definiteness, these laws may be unconstitutional, as it was so decided in Illinois where a statute enacted in 1911 was held to be unconstitutional.

The case was that of Boshuizen v. Thompson & Taylor Co. (1935) 195 N. E. 625 and companion cases. Boshuizen brought suit against her employer to recover damages for violation of Section 1 of the Illinois Occupational Diseases Law (enacted 1911). The law required the employer to provide "reasonable and approved devices, means, or methods" for the prevention of occupational diseases. The Supreme Court stated that Section 1 violated the State and Federal constitutions, and in declaring Section 1 unconstitutional, said:

"To be valid the statute must prescribe a standard so definite, fixed and understandable as to permit a compliance therewith by one who desires to meet its requirements. The statute need not specify and particularize the exact norm, but it must lay down a guide that has either a definite, fixed meaning at common law or by established and recognized precedents, or a trade, technical, or definite, specific meaning.

"'Approved', as used in Section 1, is not more intelligible than 'reasonable' as employed in that same Section. 'Approved' has no definite, special, technical, trade, or common law meaning or meaning by established precedents. By whom the approval mentioned is to be made is left open to conjecture."

In another case—Parks v. The Libby-Owens-Ford Glass Co. (1935) 195 N. E. 616—the plaintiff alleged not only violations of Section 1 of the Occupational Diseases Law of Illinois but also violations of Sections 12 and 13 of the Health, Safety and Comfort Act of Illinois (enacted 1915). The Supreme Court reaffirmed its decision in the Boshuizen case (supra) and with reference to Sections 12 and 13 of the Health, Safety and Comfort Act, which dealt with the removal of all poisonous or noxious fumes or gases, stated that the expressions "shall be removed, as far as practicable", in Section 12, and "shall be done in such a manner as to avoid the unnecessary raising of dust or noxious odors", in Section 13, are void, for vagueness, indefiniteness and uncertainty and for an attempted delegation of legislative power. They were held to be unconstitutional.

See also:

Vallat v. Radium Dial Co. (Ill. 1935) 196 N. E. 485;

Navarro v. The Illinois Steel Co. (Ill. 1935) 196 N. E. 489;

Agnew v. Woodruff & Edwards Inc. (Ill. 1937) 6 N. E. (2nd) 623.

However, there are decisions by our courts in cases holding that there is a common law remedy for occupational diseases, but in some of these cases the question was not directly raised, strongly contested on that point, nor forcefully urged or considered.

Smith v. International High Speed Steel Co. (N. J. 1923) 120 Atl. 188;

Jones v. Rinehart & Dennis Co., Inc. (W. Va. 1933) 168 S. E. 482;

Barrencotto v. Cocker Saw Co. (N. Y. 1934) 194 N. E. 61;

Mutolo v. Utica General Jobbing Ety. (N. Y. 1936) 292 N. Y. S. 14;

Berkeley Granite Corp. v. Covington (Ga. 1937) 190 S. E. 8.

In the following cases actions for damages for occupational diseases were all based upon

violations of statutory obligations, in other words, were for liabilities "created by statute" and not "at common law".

- Jellico Coal Co. v. Adkins (Ky. 1923) 247 S. W. 972;
 Elkorn Coal Corp. v. Kerr (Ky. 1924) 263 S. W. 342;
 Midland Coal Co. v. Rucker's Adm'r. (Ky. 1925) 277 S. W. 838;
 Donnelly v. Minneapolis Mfg. Co. (Minn. 1924) 201 N. W. 305;
 Cedergren v. Minnesota Steel Co. (Minn. 1933) 247 N. W. 235;
 Clark v. Banner Grain Co. (Minn. 1935) 261 N. W. 596;
 Fritz v. Elk Tanning Co. (Pa. 1917) 101 Atl. 958;
 Zajkowski v. Am. Steel & Wire Co. (C. C. A., Ohio, 1918) 258 Fed. 9;
 St. Joseph's Lead Co. v. Jones (U. S. Dist. Ct., Mo., 1934) 70 Fed. (2nd) 475;
 Wolf v. Mallinckrodt Works (Mo. 1935) 81 S. W. (2nd) 323;
 Covington v. Berkeley Granite Corp. (Ga. 1936) 184 S. E. 871;
 Jacque v. Locke Insulator Corp., (N. Y. 1934) 70 Fed. (2nd) 680;
 Depre v. Pacific Coast Forge Co. (Wash. 1929) 276 Pac. 89;
 Pellerin v. Washington Veneer Co. (Wash. 1931) 2 Pac. (2nd) 658;
 Maxwell Motor Corp. v. Winter (Ohio 1928) 163 N. E. 198;
 O'Connor v. Pillsbury Flour Mills (Minn. 1936) 267 N. W. 507;
 Kane v. Fed. Match Corp. (U. S. D. C., Penna., 1934) 5 Fed. Supp. 507;
 Wilcox v. Nat. Harvester Co. (Ill. 1917) 116 N. E. 151;
 Langeneckert v. St. Louis Sulphur Co. (Mo. App. 1933) 65 S. W. (2nd) 648;
 Plazak v. Alleghany Steel Co. (Penna. 1936) 188 Atl. 130;
 General Printing Co. v. Umback (Ind. 1935) 195 N. E. 281;
 Michalek v. U. S. Gypsum Co. (N. Y. 1935) 76 Fed. (2nd) 115. Reversed U. S. Sup. Ct.—56 Sup. Ct. 679—Retried U. S. Dist. Court 16 Fed. Supp. 708;
 Schmidt v. The Merchants Despatch Corp. (N. Y. 1936) 200 N. E. 824;
 Gentry v. Swann Chemical Co. (Ala. 1937) Unreported. Decided Ala. Sup. Ct. April, 1937.

In cases where for any reason the court of last resort has held that there is a common

law remedy for an occupational disease, or that there was a statutory liability for occupational disease in an action at law and such disease was not covered by the Workmen's Compensation Act, and the employer has a judgment rendered against him, the following cases hold that the insurance carrier is not liable to the employer insured under the policy:

- Maxson v. N. J. Manufacturers' Cas. Ins. Co. (N. J. 1929) 162 Atl. 427;
 Belleville Enameling and Stamping Co. v. U. S. Casualty Co. (Ill. 1932) 266 Ill. App. 586. Certiorari denied by Illinois Sup. Ct.;
 U. S. Radium Corp. v. Globe Indemnity Co. (N. J. 1935) 178 Atl. 271. Affirmed N. J. Court of Errors and Appeals, 182 Atl. 626;
 Utica Mutual Ins. Co. v. Hamera (N. Y. 1936) 292 N. Y. Supp. 811.

An important development has arisen in Missouri, in the Soukup case. (Soukup v. The Employers' Liability Assurance Corp., Mo. Sup. Ct., Div. 2—Sept. Term 1936—unreported). This action originated in a suit for damages for disability as a result of lead poisoning. The insurer contended that its Standard Workmen's Compensation and Employers' Liability Policy did not cover this cause of action; that the policy only protected the employer for injuries caused by accidents. The Supreme Court of Missouri (Division 2) upheld the contention of the insurer. It ruled that the policy clearly limited the liability of the insurer for injuries caused by accidents and that the policy did not cover occupational diseases.

Shortly before Division 2 of the Supreme Court handed down the above opinion the St. Louis Court of Appeals (from which tribunal appeals are taken to Division 1 of the Supreme Court of Missouri) rendered a decision in the case of Blanke-Baer Extract and Preserving Co. 96 S. W. (2nd) 648. In this case the employee claimed she contracted tuberculosis because she was required to work in a room which was damp and wet. Her clothes and feet were frequently wet for long periods of time. She recovered against her employer. Then the employer sued its insurance com-

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pany on the policy, claiming that it protected against occupational diseases. The St. Louis Court of Appeals held the insurer liable. (NOTE: Several months later this same court—St. Louis Court of Appeals—applied the same reasoning in the case of Beehler Steel Products Co.—unreported—decided Nov. 10, 1936).

As stated above, the decision of the St. Louis Court of Appeals in the Blanke-Baer case was handed down before the Supreme Court (Division 2) rendered its decision in the Soukup case. When the Supreme Court (Division 2) passed on the Soukup case it said that the opinion of the Court of Appeals in the Blanke-Baer case should no longer be followed.

A motion for a re-hearing was filed in the Supreme Court in the Soukup case (Division 2). The Court of Appeals decision in the Blanke-Baer case is being appealed to the Supreme Court (Division 1). These cases were pending before the Supreme Court in separate divisions. The Supreme Court has decided to hear arguments in both cases sitting en banc.

The cases of Banner Grain Company v. Globe Indemnity Co. (Minn. 1936) (unreported) U. S. District Court, Dist. of Minn., 4th Div., and Updike Investment Company v. Employers' Liability Assurance Corp. (Neb. 1936) 270 N. W. 107 are also interesting.

In the Banner Grain Company case, Clark, an employee, sued the Banner Grain Company at common law, alleging he became afflicted with asthma caused by inhalation of carbon tetrachloride fumes. The jury found as a fact that Clark's injury was not an accident within the definition of an accident in the Minnesota Workmen's Compensation Act. Clark recovered a verdict, which was affirmed on appeal. Judgment was satisfied by the Banner Grain Company.

Suit was brought by the Banner Grain Company against the Globe Indemnity Company. On motion to strike certain portions of the plaintiff's complaint the court followed the weight of authority on the construction of the policy and held it was clearly restricted to accidents. But the court also held that the finding of the jury that Clark did not sustain an accident within the definition of

the Minnesota Workmen's Compensation Act (in the trial of Clark's case against his employer) was not res adjudicata that such injury was not an accident within the meaning of the policy in the suit of the employer (Banner Grain Company) against its insurance carrier. Subsequently the case was tried by the same judge who had passed on the motion to strike. He found for the plaintiff; that is to say, even though Clark did not sustain an accident within the meaning of the Workmen's Compensation Act, he did sustain an accident within the policy covering the Banner Grain Company. Appeal is now pending in the United States Circuit Court of Appeals (8th Cir.).

In Updike Investment Company case, supra, the injured party brought an action for damages for having contracted a cold which resulted in illness. The insurance carrier refused to defend. Action was then brought under the provisions of the uniform declaratory judgments act for construction of the policy. Held that the contraction of a cold and subsequent illness was an accident and, therefore, covered by the policy.

The questions of what is an "Occupational Disease", or under what conditions a case of Occupational Disease is compensable as "accidental" injury have not been considered or discussed. In the answers to these questions there will be found much confusion and uncertainty, and there are an unusual number of decisions which have not been commented upon in this article, as they do not come within its scope.

FOOT NOTE: Just as this article was being printed the Supreme Court of Missouri sitting en banc reversed the decision of Division 2 of the Supreme Court in the case of Soukup v. Employers' Liability Assurance Corp. The court pointed out that the Employers' Liability Assurance Corp. was liable under its policy for disability from the disease of lead poisoning contracted by the respondent employee. Consideration is being given to the filing of a motion for re-hearing.

Almost simultaneously with the decision in the Soukup case the United States Circuit Court of Appeals, Second Circuit, rendered a decision in the case of Taylor Dredging v. Travelers' Insurance Company. The Circuit Court of Appeals held, in construing a policy of insurance (which policy contained practically the same language as the policy being construed in the Soukup case) that it did not afford coverage for pulmonary tuberculosis contracted by the employee of the insurer. "The damp, leaky and unsanitary conditions of quarters was the cause assigned. The injury was the sequel of a gradual process rather than of any specific occasion or event. The cause was, therefore, not accidental".

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Insurance Company's Right of Removal as Affected By Joinder of Resident Agent

By CASSIUS E. GATES AND RAY DUMETT
Seattle, Washington

A FOREIGN corporation, sued by a resident plaintiff in a state court action involving the jurisdictional amount, has, of course, an absolute right to remove the action to the federal court. Frequently, however, plaintiffs seek to defeat this right by joining in the action a resident defendant, often an employee or agent of a foreign corporation, and by alleging, or attempting to allege, in the declaration or complaint a joint cause of action.

With respect to this practice it is stated in *Cyclopedia of Federal Practice* (1928), Vol. 2, page 4:

"The practice of joining resident and non-resident defendants is so general that it is impossible to escape the conclusion that in a great many cases the resident defendants are made parties for the ulterior purpose of preventing the removal of the suit to the federal court. In consequence of such practice, important and vexing questions arise as to the good faith of the plaintiff seeking the joinder."

The United States Supreme Court has recognized the right of a plaintiff, who has a bona fide joint cause of action against a resident and a nonresident, to proceed against both in the state court, even though the nonresident is thus deprived of his right to a trial in the federal court. On the other hand, it is well established that a plaintiff cannot prevent removal by fraudulently joining a resident defendant.

A joinder of a resident with a nonresident defendant, though fair on the face of the complaint, may be shown by the petition for removal to be a sham and fictitious device to prevent removal. The allegations of the petition must, however, be something more than a mere allegation of fraud, or a mere traverse of the allegations of the complaint. The petition must consist of a statement of facts rightly leading to the conclusion of fraudulent joinder, apart from the pleader's conclusions.

Southern R. Co. v. Lloyd, 239 U. S. 496, 60 L. Ed. 402;

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 66 L. Ed. 144.

In determining whether the controversy upon which a petition for removal is based is wholly between citizens of different states, indispensable parties only are considered, and the court will disregard dispensable or formal parties.

James Ferry, Inc. v. John R. Wiggins Co. 287 F. 421;

Egyptian Novaculite Co. v. Stevenson, 8 F. (2d) 576;

In re Water Right of Utah Construction Co., 30 F. (2d) 436.

It therefore becomes important, in cases where a resident is joined with a nonresident to defeat removal, to determine whether the controversy between the plaintiff and the nonresident defendant, despite the plaintiff's attempt to state in the complaint a joint cause of action, is as a matter of law separable from the controversy between the plaintiff and the resident defendant.

The question of whether or not there is a separable controversy is one which, in the absence of a claim of fraudulent joinder, must appear on the face of the plaintiff's pleading. If the plaintiff's complaint sets forth facts showing a joint cause of action, and no attack is made upon the good faith of the joinder, no separable controversy is presented, even though the plaintiff may have misconceived his cause of action and even though the federal court may ultimately determine that the theory on which the action was brought was erroneous, and that no joint liability in fact existed.

If, on the other hand, the declaration or complaint fails to allege sufficient facts to show a joint cause of action, or alleges facts showing separable causes, or fails to allege facts showing any cause of action against the resident defendant, the joinder will not defeat removal.

Beal v. Chicago B. & Q. R. Co., 298 F. 180;

Hancock v. Missouri-Kansas R. Co., 28 F. (2d) 45;

Cayce v. Southern R. Co. 195 F. 786;
Kelly v. Robinson, 262 F. 695.

Recently attempts have been made to defeat removal on the part of nonresident insurance companies, sued for breach of contract in the state court, by joining as a defendant the resident manager or agent of the insurance company and alleging that the manager or agent maliciously conspired with the company to breach the latter's contract with the plaintiff.

In such cases it is manifest that the gravamen of the plaintiff's alleged cause of action against the insurance company is breach of contract. The plaintiff, however, attempts to tie the resident defendant into the controversy by alleging that the latter entered into a conspiracy or combination with the company to breach the contract. It, of course, adds nothing to the charge against the company in such cases to allege that it breached its contract maliciously or through ill will, as the result of a conspiracy or combination with its resident manager.

The rule applicable to such cases is announced in the case of *Hamilton v. Empire Gas & Fuel Company, et al.*, 297 F. 422 (certiorari denied 69 L. Ed. 465), where the plaintiff's complaint alleged the execution of an oil lease between itself, as lessor, and the defendant corporation, as lessee. The complaint further alleged that the individual defendants were managing agents of the defendant corporation and had control and management of the operation of the oil lease; that the defendant corporation violated its obligations under the lease, acting through the individual defendants; that these acts were maliciously done pursuant to a conspiracy between the defendant corporation and the individual defendants. The nonresident corporation removed the case to the federal court. In denying the plaintiff's motion to remand the court states (297 F. 424):

"On the question of remand, the contention of the plaintiffs is that their cause of action is in tort; that all of the defendants were tort-feasors, and that plaintiffs had the election to sue them jointly, and have done so; and, further, that by reason of the conspiracy alleged, the cause of action is against all of the defendants. * * * An analysis of the complaint leads us to the conclusion that at least two causes of action are stated, though they are so blended in the complaint as to appear but one.

"The existence of the lease, and of the implied covenant accompanying the same to drill protection wells on plaintiff's land when and where necessary (admitted by both parties), and the failure of the defendant company to drill such wells, make up one cause of action against the defendant company. This cause of action is for breach of contract. The allegation of ill will does not change its character; the allegation of conspiracy with the individual defendants does not change its character. * * * The individual defendants are neither necessary nor proper parties to this cause of action against the defendant company, because they are not parties to the contract. It may be conceded that, if the individual defendants, through conspiracy or otherwise, procured the defendant company to breach its contract, the individual defendants would be liable, yet the cause of action would be in tort, and not in contract. The allegations of the complaint, however, are not sufficient to state such a cause of action against the individual defendants."

The *Hamilton* case thus recognizes the rule, which is a fundamentally logical one, that where a cause of action stated against the resident defendant arises *ex delicto* and the cause of action stated against the nonresident defendant arises *ex contractu*, the causes of action are *separable*, and the joinder of the resident defendant does not defeat removal to the federal court by the nonresident defendant.

This rule is also recognized in the case of *Branchville Motor Co. v. American Surety Co.*, 27 F. (2d) 631, where the court cites with approval the *Hamilton* case and states:

"The distinction between contracts and torts is a fundamental, vital distinction in our jurisprudence, and also in that of England, from which it is derived. It is probably so fundamental in its nature as to be a necessary distinction in any logical system of jurisprudence. Unless all distinctions between contracts and torts are utterly obliterated, an action against one party on a contract and against another on a tort can never be deemed a joint action, nor can their liability be deemed joint."

Another important case applying this rule is *Sklarsky v. Great Atlantic & Pacific Tea Co. et al.*, 47 F. (2d) 662, where the court held that a cause of action in tort against a

nonresident corporation for accepting a lease with knowledge of a restrictive covenant and for inducing a breach by the lessor of the restrictive covenant was a separable controversy from a cause of action for breach of the lease against the resident lessor, and that therefore the case was removable to the federal court by the nonresident defendant. The court said:

"That in this action in which the complaint contains somewhat intertwined allegations against all three defendants, the plaintiff may fairly be said to have stated a cause of action against the Einhorn & Singer Development Corporation in contract, and, apparently, an action in tort for inducing a breach of contract against the tea company, but not to have stated any cause of action of any kind against Isaac Einhorn, the individual defendant.

"If there was any duty, in a legal sense, owed by the tea company to the plaintiff, it was a duty not founded on any privity of contract. * * *

"In any event, the cause of action alleged against the tea company is separable from that against the Einhorn Company, because it is based on breach of a wholly different duty from the contract duty owed by the Einhorn Company. * * *

"The plaintiff's alleged cause of action against the tea company can only be based on a tort, comparatively recently developed, falling under the category of maliciously inducing breaches of contract."

Another important case, following the same rule, is *Genuine Panama Hat Works v. Webb*, 36 F. (2d) 265, where it was held that the alleged liability of a resident officer of a nonresident insurance company for a breach of contract by the insurance company was not actionable, and that in any event the officer was not a necessary party to an action against the company, insofar as the right of removal by the company was concerned. The complaint alleged that the nonresident insurance company, through its resident officer, Webb, negligently and carelessly violated an agreement to transfer certain policies of insurance to a new building erected by the plaintiff. The court, in denying the plaintiff's motion to remand to the state court, said:

"By such hermaphroditic allegations the plaintiff's attorneys apparently seek to infuse into this action an element of tort and

have argued this motion on that basis. The allegation that a defendant negligently or carelessly failed to perform his contract does not convert what is really an action on a contract into an action in tort. * * *

"I cannot conceive how any claim in tort could be made out in this case against the Insurance Companies. Every liability must be founded on the breach of a duty. A duty to transfer an insurance cover could only arise out of a contract to transfer it. The plaintiff's attorneys are doubtless well aware of this, but they have apparently endeavored to erect a tort claim on a contract background by the allegations of negligence or its equivalent, above mentioned. Probably they have done this because they fancied that only by such a course of pleading they could keep Webb in the case, and maintained on this motion that the cause of action against him was not separable from the causes of action against the insurance companies.

"But recriminatory words sounding in tort, however numerous or however oft-repeated, cannot change the structural essence of a cause of action. On a motion of this kind, I am entitled to look at the real situation which exists, in spite of allegations by the plaintiff of conclusions which are not supported by the underlying facts as shown in the papers before me. Otherwise, the right to remove a case to the United States court will be illusory. *Scherrer v. Foster*, 5 F. (2d) 236, 237; *Gustafson v. Chicago, R. I. & P. Ry. Co. et al.*, 128 F. 85, 88.

"The real structure of the plaintiff's case, as revealed in the papers before me, is simple. It is that Webb was the agent of each of two known principals with whom the plaintiff claims it made a contract to transfer insurance coverage, and that this contract was not performed, with the result that the plaintiff was damaged in an amount named. * * *

"If Webb made a contract for known principals, whilst acting within his authority as their agent, he is not personally liable on the resultant contract, and is certainly not a necessary, and probably not a proper, party to a case against his principals on the contract. *Parks v. Ross*, 13 L. Ed. 730, *Oelrichs v. Ford*, 16 L. Ed. 534; *Whitney v. Wyman*, 101 U. S. 392, 396, 25 L. Ed. 1050; *Hitchcock v. Buchanan*, 105 U. S. 416, 417, 26 L. Ed. 1078; *Bald-*

win v. Black, 119 U. S. 643, 647, 30 L. Ed. 530.

"If, on the other hand, Webb acted in excess of his authority, and his principals are, therefore, not bound, he may be liable to the plaintiff on a breach of his warranty of authority. Such a liability would, of course, be wholly personal to Webb, and obviously would be separable from the liability of the defendant insurance companies, because it would be inconsistent therewith."

In the recent case of *Lucopoulos v. North American Life Assurance Company and Ed S. Sears*, Cause No. 20870 of the United States District Court for the Western District of Washington, Northern Division, the plaintiff's complaint alleged that the plaintiff entered into a written contract with the non-resident life insurance company, whereby the plaintiff was employed as agent for the company for the sale of life insurance in the state of Washington; that under this contract the plaintiff sold life insurance for the company; that on February 17, 1931, the company and its resident state manager, the defendant Ed S. Sears, wrongfully, fraudulently and maliciously breached the contract between the plaintiff and the company and refused to permit the plaintiff to solicit further insurance for the company. The plaintiff demanded judgment against the insurance company and the defendant Sears for alleged commissions earned and for lost profits resulting from the alleged breach of the contract. The case was removed from the state court to the federal court by the insurance company. The plaintiff then filed a motion to remand the case to the state court. The petition for removal of the insurance company set up separable controversy and fraudulent joinder. On May 6, 1936, the United States District Court rendered its decision (unreported) de-

nying the motion to remand. The court's decision stated:

"The cause of action, if any, stated against the defendant Sears is based upon tort, although the recovery sought is limited to the amount that plaintiff claims he would have received had his contract with the defendant been performed. *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 205-22, 223; *Delano v. Tennence*, 138 Wash. 39-46, 47; *Ulvestad v. Dolphin*, 158 Wash. 629-631.

"The cause of action, if any, stated against the defendant company, is based upon contract. The defendant company for the breach of such a contract, would not be liable for exemplary damages, no matter what the malice that may have actuated its agent, Sears. *Young v. Maine*, 72 F. (2d) 640-643; *Fordson Coal Co. v. Kentucky River Coal Corp.*, 69 F. (2d) 131-132; 17 C. J. 976.

"The complaint presents a separable controversy. *Sklarsky v. Great Atlantic & Pacific Tea Co.*, 47 F. (2d) 662; *Genuine Panama Hat Works v. Webb*, 36 F. (2d) 265. The motion to remand will be denied."

As stated in the cases of *Hamilton v. Empire Gas & Fuel Co.*, 297 F. 422, and *Sklarsky v. Great Atlantic & Pacific Tea Co.*, 47 F. (2d) 662, quoted above, the rule with respect to separable controversy is the same, even though the plaintiff, in an attempt to defeat removal, alleges that the resident agent maliciously induced his nonresident principal to breach its contract with the plaintiff. Such an allegation would present at most a cause of action against the resident agent sounding in tort,—the tort commonly known as "interference",—whereas, the cause of action against the nonresident principal would clearly be one for breach of contract only.

Of Legislatures and Legislation

By GERALD P. HAYES,
Milwaukee, Wisconsin

"THE purpose of this Association shall be * * * to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada * * *."

We have a Committee on General Legislation. Its work is arduous and of the greatest importance to the companies. Legislative Committees have been named in the United States for each State. They are functioning

and of real assistance to the General committee. It is their duty to watch proposed legislation, whether it be new or designed to repeal or change existing statutes affecting the insurance industry. This work is a public benefaction too, because the business of insurance, all lines, is freighted with a public trust. The millions of policy beneficiaries, the thousands who have invested in the securities of stock companies and the thousands who are interested in the financial success of the mutual companies, as well as that large portion of our population dependent upon all of the companies for a livelihood, have the unquestioned right to know that their legislative interests are being efficiently protected. Our Association, through its General and State committees, is engaged in a stupendous program to accomplish just that. It is an outstanding public service. The inestimable value of such work to the companies and to the public is attested by the companies in their increasing interest in our Association.

When I promised your Editor to write a short article for the July issue of Insurance Counsel Journal, I was at a loss to discover a legal subject which I would be capable of treating in such a way as would be of either help or interest to the membership. I have, however, pondered often over the suggestions I here make.

Legislatures are oftentimes difficult of understanding. Large percentages of their memberships enter the legislative halls on an avid lookout for any kind of a proposal that indicates increased burdens for the companies. "Soak the Insurance Companies" is the battle cry of the publicity seekers. Certain unscrupulous lawyer-legislators endeavor to effect passage of laws (and often succeed), to make easier, if not certain, the mulcting of insurance companies in personal injury cases. "Socially-minded" representatives of the people adopt the insurance field as the proving ground for unwise and unfair experimentations. "Spite bills" find their way to the hopper. "Request Bills" are turned in by the hand full. The good of the public is tossed aside. In the eyes of such unreal representatives of the people the business of insurance is an iniquity, and, sad to relate, such carryings on find favor with a large part of our population, who cannot, or will not, understand what is at the bottom of it all.

No State is devoid of the foregoing experiences. Most legislatures meeting this

year have produced typical examples of criticism cited. The legislators, who, each session, create such commotion, are usually a minority, but they cause no end of trouble to their law making brethren and to the insurance world whose *proper* destiny we, as members of this Association, have undertaken to foster and protect.

This is my thought: Every one of us, as a deep rooted part of the privilege of membership in this Association, owes a duty to the companies and the public to take upon our individual shoulders the immediate obligation of a more aggressive concern in the matter of insurance legislation. The General and the State Legislative Committees cannot go it alone. It is unfair to expect them to do so. We, lawyers, are too prone to let the other fellow do it. We are aloof to legislatures and legislation. We spurn the possibilities of unjust legislation, and we awake to find insidious insurance statutes in our laps. Our training and profession should make us the watch dogs of the statute books, but we are not. If our excessive energy and zeal in the defense of the rights of our company clients and their insureds were extended to matters of law making, our clients would be rid of a large portion of the never-ending legislative turmoil with which they are continually confronted. Lethargy on this front has no place in our business. Responsible legislators welcome our counsel and advice. What group of men is more capable of giving it?

Is it not true that the legislative committee hearings on insurance subjects should be crowded with our members? Why should we be conspicuous by our absence? How many of our members properly contact or communicate with those members of the legislature who should be contacted concerning insurance measures? How many of our members truly know what is contained in the batch of bills offered at each session of each legislature affecting the life of the insurance company? A flaming interest in legislative matters affecting the insurance industry is our bounden duty. Membership in this Association dictates it. We have done some good, but are far from being efficient.

I humbly offer the foregoing after watching the legislative acrobatics of several sessions, and as my observations of the responsibilities as to legislation imposed upon us as individual members of International Association of Insurance Counsel.

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